Jurisdictional Statement

No. 81 5566

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

DANIEL R. DENARDO,
IN PROPRIA PERSONA,

Appellant,

v.

PATRICK MURPHY, DIRECTOR, APEA
ALASKA PUBLIC EMPLOYEES ASSOCIATION,
STATE OF ALASKA,

Appellees.

ON APPEAL FROM THE SUPREME COURT
FOR THE STATE OF ALASKA

JURISDICTIONAL STATEMENT

Daniel R, DeNardo
In Propria Persona,
In Forma Pauperis
Box 682
Anchorage, Alaska 99510-0682

QUESTIONS PRESENTED

I. Whether the United States Supreme Court case of New York Central Railroad Company v. New York and Pannsylvania Company, 271 U.S. 124 (1926) is dispositive of the issues in this case on appeal.

II. Does a void administrative decision not timely appealed preclude due process and equal protection of the laws in adjudicating a Constitutional property interest under the Fourteenth Amendment, and trial by jury under the Seventh Amendment of the United States Constitution?

PARTIES BELOW

Daniel R. DeNardo, plaintiff, is a citizen of the United States of America. He was a permanent employee of the State of Alaska and a non-member agency fee payer under the 1977-1979 Agreement between the State of Alaska and Alaska Public Employees Association, covering General Government Unit Employees.

The State of Alaska was the employer. The State terminated Mr. DeNardo pursuant to a request from the Alaska Public Employees Association.

Alaska Public Employees Association ("APEA") is a nonprofit corporation representing State of Alaska employees under Alaska Statute 23.40, Article 2, Public Employment Relations Act.

Mr. Patrick Murphy was, at the time in question herein, Executive Director of APEA.

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OPINIONS BELOW

The void decision of the State Labor Relations Agency was issued 8 January, 1979. (Appendix C.)

The opinion of the Superior Court of Alaska, granting summary judgment to the defendant movants, was issued 8 October, 1980 and entered 10 October, 1980. (Appendix B.)

The memorandum decision of the Supreme Court of Alaska was issued 28 July, 1981. Rehearing was denied 27 August, 1981. (Appendix A.)

STATEMENT OF JURISDICTION

Daniel R. DeNardo appeals from the final judgment of the Supreme Court of the State of Alaska dated 28 July, 1981. The judgment affirmed the decision of the Superior Court of Alaska which held that Mr. DeNardo failed to timely appeal the void decision of the State Labor Relations Agency. Rehearing was denied 27 August, 1981.

The void administrative decision gained no validity by being affirmed by the Superior and Supreme Courts, especially since the validity of the Labor Relations Agency's decision was not an issue on appeal. The affirmance is a method of passing the determination of the federal question on to the United States Supreme Court. 5 Am Jur 2d, Sec. 935, 3 Am Jur, Sec. 1167 and 1168.

The question presented to the United States Supreme Court is one of Constitutional fact. Watts v. Seward School Board, Alaska, 395 P.2d 372, vac. 85 S.Ct. 1321, 381 U.S. 126, 14 L.Ed.2d 261, on remand 421 P.2d 586, reh den 423 P.2d 678, vac 88 S.Ct 1753, 391 U.S. 592, 2 L.ed.2d 842, on remand 454 P.2d 732, reh den 423 P.2d 678, cert den 90 S.Ct. 899, 397 U.S. 921, 25 L.Ed.2d 101, reh den 90 S.Ct. 1495, 397 U.S. 1071, 25 L.Ed.2d 695; Fiske v. Kansas, 274 U.S. 380, 385-386 (1927); Creswill v. Pythias of Georgia, 225 U.S. 246, 261 (1912); St. Joseph Stock Yards v. U.S., 298 U.S. 38, 51-52 (1936).

The federal rights of property, due process, equal protection of the laws, and the right to trial by jury have been denied by a void administrative decision pursuant to Alaska Statute 23.40, Article 2, Public Employment Relations

Act. The application of this statute to Mr. DeNardo's Constitutional property interest is repugnant to the Constitution of the United States of America.

"We think the conclusion is unavoidable that the statute, as so construed and applied, is an arbitrary exercise of the powers of government and violative of the fundamental rights embraced within the conception of due process of law . . . but attaches onerous penalties to the non-payment of extravagant demands, thereby making submission to them the preferable alternative. Thus, it takes property from one and gives it to another, not because of a breach by the former of a duty to the public, but because of a lawful exercise of an undoubted right. Plainly this cannot be done consistently with due process of law." St. Louis Iron Mountain R.R. v. Wynne, 224 U.S. 354, 359, 360 (1912).

APEA demanded the double payment of fees after they had issued Mr. DeNardo receipts showing he had paid his fees in cash. Because Mr. DeNardo refused APEA's illegal request that the fees be paid a second time, he was terminated and deprived of his Constitutional property interest.

The order of a commission of a state is a statute within the meaning of 28 U.S.C. Sec. 1257(2). King Manufacturing v. Augusta, 277 U.S. 100 (1928); Sultan Railway and Timber v. State of Washington, 277 U.S. 135 (1928).

The substantial federal questions of the rights secured under the Fourteenth Amendment and the Seventh Amendment of the U. S. Constitution were properly before the courts of Alaska. Street v. New York, 394 U.S. 576, 581-584 (1969); Bryant v. Zimmerman, 278 U.S. 63, 67 (1928).

The State of Alaska cannot avoid the Federal questions on insubstantial state grounds. NAACP v. Alabama, 357 U.S. 449,

454-458 (1958); Wolfe v. North Carolina, 364 U.S. 177, 185 (1938); WOW v. Johnson, 326 U.S. 120, 129 (1945).

State procedural grounds are no bar to review on federal Constitutional grounds. Henry v. Mississippi, 379, U.S. 143, 447 (1965); Lovell v. City of Griffin, 303 U.S. 444, 450 (1938); Love v. Griffith, 266 U.S. 32-34 (1924).

The jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. Sec. 1257(2).

STATUTORY PROVISIONS

Alaska Statutes

Sec. 09.25.080. Right to receipt upon payment or delivery. A person who pays money or delivers an instrument or property is entitled to a receipt for it from the person to whom the payment or delivery is made, and may demand a proper signature to the receipt as a condition of the payment or delivery. (§ 3.19 ch. 101 S.L.A. 1962.)

Sec. 09.25.090. Objections to tender. The person to whom a tender is made shall at the time specify any objection he may have to the money, instrument, or property, or he waives it. If the objection is to the amount of money, the terms of the instrument, or the amount or kind of property, he shall specify the amount, terms, or kind which he requires, or is precluded from objecting later. This section shall not be construed to modify or change in any manner corresponding provisions of the Uniform Commercial Code (AS 45.05). (§ 3.20 ch. 101 S.L.A. 1962.)

Sec. 23.40.070. Declaration of policy. The legislature finds that joint decision-making is the modern way of administering government. If public employees have been granted the right to share in the decision-making process affecting wages and working conditions, they have become more responsive and better able to exchange ideas and information on operations with their administrators. Accordingly, government

is made more effective. The legislature further finds that the enactment of positive legislation establishing guidelines for public employment relations is the best way to harness and direct the energies of public employees eager to have a voice in determining their conditions of work, to provide a rational method for dealing with disputes and work stoppages, to strengthen the merit principle where civil service is in effect and to maintain a favorable political and social environment. The legislature declares that it is the public policy of the state to promote harmonious and cooperative relations between government and its employees and to protect the public by assuring effective and orderly operations of government. These policies are to be effectuated by

(1) recognizing the right of public employees to organize for the purpose of collective bargaining;

(2) requiring public employers to negotiate with and enter into written agreements with employee organizations on matters of wages, hours, and other terms and conditions of employment;

(3) maintaining merit-system principles among public employees. (§ 2 ch 113 S.L.A. 1972.)

Sec. 23.40.110. Unfair labor practices. (a) A public employer or his agent may not

(1) interfere, restrain or coerce an employee in the exercise of his rights guaranteed in § 80 of this chapter;

(2) dominate or interfere with the formation, existence or administration of an organization;

(3) discriminate in regard to hire or tenure of

employment or a term or condition of employment to encourage or discourage membership in an organization;

(4) discharge or discriminate against an employee because he has signed or filed an affidavit, petition or complaint or given testimony under §§ 70-260 of this chapter;

(5) refuse to bargain collectively in good faith with an organization which is the exclusive representative of employees in an appropriate unit, including but not limited to the discussing of grievances with the exclusive representative.

(b) Nothing in this chapter prohibits a public employer from making an agreement with an organization to require as a condition of employment

(1) membership in the organization which represents the unit on or after the 30th day following the beginning of employment or on the effective date of the agreement, whichever is later; or

(2) payment by the employee to the exclusive bargaining agent of a service fee to reimburse the exclusive bargaining agent for the expense of representing the members of the bargaining unit.

(c) A labor or employee organization or its agents may not

(1) restrain or coerce

(A) an employee in the exercise of the rights guaranteed in § 80 of this chapter, or

(B) a public employer in the selection of his representative for the purposes of collective bargaining or the adjustment of grievances;

(2) refuse to bargain collectively in good faith with a public employer, if it has been designated in accordance with the provisions of §§ 70-260 of this chapter as the exclusive representative of employees in an appropriate unit. (§ 2 ch. 113 S.L.A. 1972.)

Sec. 23.40.130. Complaint and accusation. If the labor relations agency fails to eliminate the prohibited practice by conciliation and to obtain voluntary compliance with §§ 70-260 of this chapter, or, before it attempts conciliation, it may serve a copy of the complaint or accusation upon the respondent. The complaint or accusation and the subsequent procedures shall be handled in accordance with the administrative adjudication portion of the Administrative Procedure Act (AS 44.62). (§ 2 ch. 113 S.L.A. 1972.)

Sec. 44.62.450. Hearings. (a) A hearing in a contested case shall be presided over by a hearing officer. The agency itself shall determine whether the hearing officer hears the case alone or whether the agency hears the case with the hearing officer.

(b) If the agency hears the case the hearing officer shall preside at the hearing, rule on the admission and exclusion of evidence, and advise the agency on matters of law. The agency shall exercise all other powers relating to the conduct of the hearing, but may delegate any or all of these other powers to the hearing officer. If the hearing officer hears a case alone, he shall exercise all powers relating to the conduct of the hearing.

(c) A hearing officer or agency member shall voluntarily disqualify himself and withdraw from a case in which he cannot accord a fair and impartial hearing or consideration. A party may request the disqualification of a hearing officer or agency member by filing an affidavit, before the taking of evidence at a hearing, stating with particularity the grounds upon which it is claimed that a fair and impartial hearing cannot be accorded. If the request concerns an agency member the issue shall be determined by the other members of the agency. If the request concerns the hearing officer, the issue shall be determined by the agency when the agency hears the case with the hearing officer, and by the hearing when he hears the case alone. No agency member may withdraw voluntarily or be disqualified if his disqualification would prevent the existence of a quorum qualified to act in the particular case.

(d) The proceedings at the hearing shall be reported by a phonographic reporter or recorder, or other adequate means of assuring an accurate record. (§ 13 (ch. 2) ch. 143 S.L.A. 1959.)

Sec. 44.62.460. Evidence rules. (a) Oral evidence may be taken only on oath or affirmation.

(b) Each party may (1) call and examine witnesses; (2) introduce exhibits; (3) cross-examine opposing witnesses on matter relevant to the issues, even though that matter was not covered in the direct examination; (4) impeach a witness regardless of which party first called to witness to testify; and (5) rebut the evidence against himself.

(c) If the respondent does not testify in his own behalf he may be called and examined as if under cross-examination.

(d) The hearing need not be conducted according to technical rules relating to evidence and witnesses. Relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the evidence over objection in a civil action. Hearsay evidence may be used to supplement or explain direct evidence but is not sufficient by itself to support a finding unless it would be admissible over objection in a civil action. The rules of privilege are effective to the same extent that they are recognized in a civil action. Irrelevant and unduly repetitious evidence shall be excluded.

(e) Nothing in this chapter may be construed to alter the ordinary rules of burden of proof of judicial proceedings in the state. (§ 14 (ch. 2) ch. 143 S.L.A. 1959; am § 8 ch. 5 S.L.A. 1966.)

Sec. 44.62.500. Decision in a contested case. (a) If a contested case is heard before an agency (1) the hearing officer who presided at the hearing shall be present during the consideration of the case and, if requested, shall assist and advise the agency; and (2) a member of the agency who has not heard the evidence may not vote on the decision.

(b) If a contested case is heard by a hearing officer alone, he shall prepare a proposed decision in a form which may be adopted as the decision in the case. A copy of the proposed decision shall be filed by the agency as a public record with the lieutenant governor and a copy of the proposed decision shall be served by the agency on each party in the case and his attorney. The agency itself may adopt the proposed decision in

its entirety, or may reduce the proposed penalty and adopt the balance of the proposed decision.

(c) If the proposed decision is not adopted as provided in (b) of this section the agency may decide the case upon the record, including the transcript, with or without taking additional evidence, or may refer the case to the same or another hearng officer to take additional evidence. If the case is so assigned to a hearing officer he shall prepare a proposed decision as provided in (b) of this section upon the additional evidence.

Sec. 44.62.510. Form and effect of decision. (a) A decision shall be written and shall contain findings of fact, a determination of the issues presented and the penalty, if any. The findings may be stated in the language of the pleadings or by reference to them. Copies of the decision shall be delivered to the parties personally or sent to them by registered mail.

(b) A decision is a primarily judicial proceeding has retroactive effect in the same manner as a decision of a state court. (§ 19 (ch. 2) ch. 143 S.L.A. 1959.)

Alaska Civil Rules of Court

Rule 45. Appeals to Superior Court From District Court and From Administrative Agencies.

(a) When Taken.

(1) The time within which an appeal may be taken to the superior court from the district court shall be

30 days from the entry of the judgment appealed from. The running of the time for appeal shall be the same as set forth in Appellate Rule 7(a).

(2) The time within which an appeal may be taken to the superior court from an administrative agency shall be 30 days from the date that the order appealed from is mailed or delivered to the appellant. If a request for agency reconsideration is timely filed before the agency, the notice of appeal must be filed within 30 days after the agency's reconsideration decision.

Labor Agency Regulations

2. AAC 10.440. Orders. (a) At the conclusion of a hearing, the labor relations agency will prepare a written order based upon the decision rendered.

(b) Relevant decisions of the National Labor Relations Board and federal courts will be given great weight in determinations made under this chapter and AS 23.40. (Eff. 6/2/78, Reg. 66.) Authority: AS 23.40.100, AS 23.40.110, AS 23.40.140. AS 23.40.170.

STATEMENT OF THE CASE

[The citations designated below as (R) are to the official appeal record of the Alaska Supreme Court, and those designated (TR) are to the official transcript attached hereto as Appendix H.]

Daniel R. DeNardo was a permanent employee with the State of Alaska (R.2, 5, 7) when he was terminated on 21 April, 1978 by the State of Alaska (R.60, Fact No. 18)(R.99) pursuant to a written demand from APEA. APEA alleged that Mr. DeNardo failed to pay his obligatory agency fees under Article 9 of the 1977-1979 Collective Labor Agreement (R.60, Fact No. 17)(R.95, 96, 97, 98)(TR.3, L17-19). APEA had given Mr. DeNardo hand-written receipts in conformity with AS 9.25.080, Right to Receipt Upon Payment of Delivery, and AS 9.25.090, Objection to Tender, when Mr. DeNardo had originally paid those same agency fees, which APEA was now demanding be paid a second time (R.59, Fact No. 9)(R.60, Fact Nos. 15, 16, 19)(R.84, 93, 96, 100)(TR.14, L5-7)(TR.20, L11-13).

Mr. DeNardo filed an unfair labor practice complaint under AS 23.40.110 with the State Labor Relations Agency (the "Agency") on 6 July, 1978 (R.144-145), and an Agency hearing was held 10 October, 1978 (R.104, L9-10)(TR.3, L22). Ruling contrary to the irrefutable documentary evidence (R.84, 93, 94, 95, 96, 100), the Agency issued its void decision 8 January, 1979 (R.102-112)(Appendix C), denying Mr. DeNardo's complaint. The decision was based on the erroneous assumption of law that the Agency could arbitrarily interpret the agency shop provision AS 23.40.110(5)(b)(2) as justifying APEA's demands

for the double payment of agency fees (R.85, 86, Accounting Entries)(R.58, 60, 65)(TR.103, L18-24). The Agency stated there was no agency shop provision in the Taft-Hartley Act and therefore there were no National Labor Relations Board decisions or federal cases to rely on (R.110).

The Agency's regulation 2 AAC 10.440(b) required "[r]elevant decisions of the NLRB and federal courts will be given great weight in determinations made under this chapter and AS 23.40." (R.61.) In fact, the Taft-Hartley Act provides for an agency shop in Sec. 8(a)(3), whereby "[m]embership as a condition of employment is whittled down to its financial core." NLRB v. General Motors, 373 U.S. 734 (1963)(R.67.)

On 10 April, 1980 Mr. DeNardo filed an action at law with a request for jury trial (R.1-4)(TR.3, L12). The defendants filed a motion to dismiss on 7 July, 1980 (R.22, 39) on the grounds of res judicata and failure to file a timely appeal (TR.4, L9-12). A summary judgment hearing was held on 21 August, 1980.

Mr. DeNardo collaterally attacked (R.53)(TR.13, L24-25; TR.14, L1-2) the State Labor Relations Agency's Decision No. 39 (R.102-112) as being void for lack of jurisdiction to render a decision contrary to all the evidence and all the substantive law (R.51-132)(TR.5, L11-26; TR.11, L1-25). The void decision as fact was argued on the basis of a verified complaint (R.1-4), two verified memoranda of law and facts (R.51-74), and eighty-nine admissible and undisputed evidentiary documents. Fifty-eight of the documents were submitted by Mr. DeNardo (R.75-132), twenty-nine by APEA and Mr. Murphy (R.149-177), and two by the State of Alaska (R.185, 186, 210, 211).

Additionally, Mr. DeNardo adopted all of the cases cited by defendants as being on point to his argument (TR.9, L16-17).

For purposes of the Civil Rule 56 Motion for Summary Judgment, the court assumed all the pleaded and undisputed documentary facts in favor of the non-movant Mr. DeNardo (TR.11, L1-10; TR.14, L15-17; TR.20, L10-16; TR.28, L17-25; TR.31, 32). Defendants were granted summary judgment as a matter of law (TR.32) because there was a lack of showing by Mr. DeNardo of excusable neglect (TR.29, L3-4) to make a timely administrative appeal of the Agency's void decision (TR.11, L8-10; TR.14, L25; TR. 15, L1-2; TR.23, L23-25; TR.24, L1-2; TR.28, L25; TR.29, L1-5).

An appeal was timely filed in the Alaska Supreme Court. The issue presented was "Does a void adminstrative decision depriving an individual of his property preclude due process by jury trial in an action at law ?"

In the record, the defendants admitted that there were no statutory or contractual remedies that needed to be exhausted and that Mr. DeNardo was free to bring an action at law or file for an administrative hearing. The United States Supreme Court has ruled on the available remedies in Vaca v. Sipes, 386 U.S. 171 (1967).

The questions presented were raised in the briefs and in oral argument before the Superior and Supreme Courts of the State of Alaska.

SUMMARY OF ARGUMENT

Mr. DeNardo suffered a deprivation of his property interest as a permanent State of Alaska employee by a denial of due process of law protected by the Fourteenth Amendment of the United States Constitution by the void decision of the State Labor Relations Agency which resulted in the loss of its jurisdiction.

The Agency rendered a void decision by ruling contrary to all of the evidence and all of the substantive law.

Although the Agency's jurisdiction was invoked by Mr. DeNardo, the Agency subsequently lost that jurisdiction by rendering its void decision. Johnson v. Zerbst, 304 U.S. 458, 468 (1938).

> "The line which separates error in judgment from the usurpation of power, is very definite; and is precisely that which denotes the cases where a judgment or decree is reversible only by an appellate court, or may be declared a nullity collaterally, when it is offered in evidence in an action concerning the matter adjudicated, or purporting to have been so. In the one case, it is a record importing absolute verity; in the other, mere waste paper; there can be no middle character assigned to judicial proceedings, which are irreversible for error."

Voorhees v. U.S. Bank, 10 Pet. 449 (1836).

> "The general and well settled rule of law in such cases is, that when the proceedings are collaterally drawn in question, and it appears on the face of them, that the subject matter was within the jurisdiction of the court, they are voidable only. The errors and irregularities, if any exist, are to be corrected by some direct proceeding, either before the same court, to set them aside, or in an appellate court. If there is a total event of jurisdiction, the proceedings are void, and a mere nullity, and confer no right, and afford no justification; and may be rejected, when collaterally drawn in question."

Voorhees, supra, p.477.

Mr. DeNardo properly collaterally attacked the decision in a summary judgment proceeding in which he was the non-movant.

The Superior Court judge found the fact of the Agency's void decision for Mr. DeNardo, but rules that a timely appeal within thirty (30) days under Alaska Civil Rule 45 was the only procedure to attack the void decision. This ruling was made in spite of the defendants' admission upon direct question by the judge:

The Court: "Would you agree that if the decision is void that a collateral attack such as this is proper?

Ms. Stephson: "I think that is the rule."

(Appendix H. p.25, lines 8-10.)

THE QUESTIONS ARE SUBSTANTIAL

I. THE UNITED STATES SUPREME COURT CASE OF NEW YORK CENTRAL RAILROAD COMPANY v. NEW YORK AND PENNSYLVANIA COMPANY, 271 U.S. 124 (1926), IS DISPOSITIVE OF THE ISSUES IN THIS CASE ON APPEAL.

The facts and the law of 271 U.S. 124 (1926) and this case on appeal are the same. The Pennsylvania Supreme Court in New York and Pennsylvania Company v. New York Central Railroad Company, 126 A 382 (1924) affirmed the judgment of the lower court in 110 A 288 by quoting "Defendants attempted to reraise the question decided in the first proceeding, but this it could not then or thereafter do, not because the facts and law there laid down were res judicata in the usual acceptation of that term, but because by article 6, section 31, of the act, defendant's failure to appeal made all those rulings 'conclusive upon all parties affected thereby.' NY & Pa. Co. v. N.Y.C. RR Co., p.70 (110 Atl.288)"; Pennsylvania Supreme Court, supra, page 384. (Emphasis added.)

The U.S. Supreme Court reversed the Pennsylvania Supreme Court in the following opinion delivered by Mr. Justice Holmes.

> "This is a suit brought in a court of Pennsylvania to recover the amount of alleged excess charges paid by the defendant in error for the carriage of coal in commerce within the State, and ordered by the Public Service Commission of Pennsylvania to be repaid by way of reparation. A judgment on the order in favor of the defendant in error was affirmed by the Supreme Court of Pennsylvania. 281 Pl. 257. The charges in question were for shipments between March 1, 1920, and September 1, 1920, the six months following the termination of federal control of the railroads. The rates charged were those that were in effect on February 29, 1920. By § 208(a) of the Transportation Act, 1920, (February 29, 1920, c.91; 41 Stat. 456, 464) prior to September 1, 1920, no such rate could be reduced unless the reduction was approved by the Interstate Commerce Commission, the six months concerned being the period during which the United States guaranteed certain income to the railroads by § 209. The Interstate Commerce Commission has not approved any reduction and

therefore it is plain that the State Commission had no authority to intermeddle with the rates that it undertook to cut down. It is true that regulating rates and awarding reparation are different matters. But the prohibition in the statute covers either method of reducing the pay received by the roads. The language of the statute and the reasons for the enactment too clearly apply to intrastate as well as to interstate rates, to admit debate. Missouri Pacific R.R. Co. v. Boone, 270 U.S. 466. Whether the rates were right, or were wrong as the State Court thinks, they could be changed only in one way.

It may be that some of the questions before us would be proper matters for a writ of error, but as the rights asserted under the statute of the United States are more fully open upon a writ of certiorari we shall consider the case upon the last mentioned writ.

The State Courts were of opinion that the plaintiffs in error had waived their rights by their failure to appeal from a decision on an earlier complaint to the State Commission in which that commission held that a lower rate was reasonable and stated that upon presentation of a petition accompanied by the supporting data reparation would be awarded for freight charges paid in excess of the rates thus fixed. Whether the federal rights asserted were lost in this way is open to examination here. Creswill v. Grand Lodge Knights of Pythias, 225 U.S. 246. Ward v. Love County, 253 U.S. 17, 22. Davis v. Wechsler, 263 U.S. 22, 24.

In our opinion the failure to appeal from the former order is no bar. We do not undertake to review the decision of the Supreme Court as to state procedure, but if the Railroads were too late to argue their case before that Court they are not too late to argue it here. There was no order in the former hearing before the State Commission that the Railroads could have brought before us. This is the first moment when they have had a chance to raise what we regard as a perfectly clear point, as it is the first moment when their rights have been infringed. There now is an order which is in the teeth of the statute. It would not be reasonable to hold that they are precluded from getting the protection that this Court owes them, by their having failed to go as far as they now learn that they might have gone in a previous state proceeding which did not infringe their rights and which could not be brought here. "The judgment under review was the only final judgment . . . from which plaintiff in error could prosecute a writ of error, and unitl such final judgment the case could not have been brought here for review." Chesapeake & Ohio Ry. Co. v. McCabe, 213 U.S. 207, 214. Smith v. McCullough, 270 U.S. 456.

Writ of certiorari granted.
Writ of error dismissed.
Judgment reversed.

Mr. Justice Sutherland took no part in the consideration or decision of this case."

(Emphasis added.)

Mr. DeNardo filed an action at law and collaterally attacked the decision of the State Labor Relations Agency as void because the Agency proceeded beyond its jurisdiction and deprived Mr. DeNardo of his Constitutional property interest without due process of law. The Supreme Court of Alaska Affirmed the void decision because Mr. DeNardo failed to administratively appeal within the thirty (30) day limit. The final judgment of the Supreme Court is the only final judgment from which appeal could be taken. The underlying decision of the State Labor Relations Agency was void and affirmance by the Superior and Supreme Courts of Alaska gave it no validity.

Based upon the uncontroverted statements of evidence in the Statement of the Case, Mr. DeNardo prays the United States Supreme Court exercise its jurisdiction under 28 U.S.C. 1257(2) and 2106 and reverse the judgment of the Alaska Supreme Court and grant Mr. DeNardo judgment on his Constitutional rights under the Fourteenth and Seventh Amendments of the United States Constitution.

II. DOES A VOID ADMINISTRATIVE DECISION NOT TIMELY APPEALED, PRECLUDE DUE PROCESS AND EQUAL PROTECTION OF THE LAWS IN ADJUDICATING A CONSTITUTIONAL PROPERTY INTEREST UNDER THE FOURTEENTH AMENDMENT, AND TRIAL BY JURY UNDER THE SEVENTH AMENDMENT OF THE UNITED STATES CONSTITUTION?

A. MR. DENARDO HAD A CONSTITUTIONAL PROPERTY INTEREST AS A PERMANENT STATE EMPLOYEE.

Mr. DeNardo was a permanent State employee with a property interest protected by the Fourteenth Amendment of the United States Constitution.

In University of Alaska v. Chauvin, 521 P.2d 1234 (Alaska Supreme Court 1974), the Alaska Supreme Court adopted the conclusions compelled by Board of Regents v. Roth, 408 U.S. 564 (1972) and Perry v. Sinderman, 408 U.S. 593 (1972).

B. THE STATE LABOR RELATIONS AGENCY'S VOID DECISION IS A FACT FOR THE PURPOSES OF THIS APPEAL.

> "The bill charges in clear and definite terms, that this finding was wholly unsupported by evidence. We must take that fact as admitted for the purposes of this appeal. The allegation is made as one of fact. There is no suggestion in the motion to dismiss that this fact is not well pleaded; or that a copy of the evidence introduced at the hearing should have been answered to the bill."

Baltimore and Ohio R.R. v. Interstate Commerce Commission, 264 U.S. 258, 262 (1924).

Mr. DeNardo was the non-movant in a summary judgment proceeding in the Superior Court of Alaska. Mr. DeNardo argued the fact of the Agency's void decision, a decision that was totally contrary to all of the evidence and all of the substantive law.

This fact must be considered in the light most favorable to Mr. DeNardo. Bishop v. Wood, 426 U.S. 341, 347 (1976); U.S. v. Diebold, 369 U.S. 654, 655 (1962).

C. A VOID DECISION IS A LOSS OF JURISDICTION AND A DEPRIVATION OF RIGHTS UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

> "A court's jurisdiction at the beginning of trial may be lost 'in the course of the proceedings' due to failure

> to complete the court - as the Sixth Amendment requires - by providing counsel for an accused who is unable to obtain counsel, who has not intelligently waived this constitutional guaranty, and whose life or liberty is at stake. If this requirement of the Sixth Amendment is not complied with, the court no longer has jurisdiction to proceed. The judgment of conviction pronounced by a court without jurisdiction is void, and one imprisoned thereunder may obtain release by habeas corpus."

Johnson v. Zerbst, 304 U.S. 458, 468 (1938).

The State Labor Relations Agency, under AS 23.40.130 Complaint and Accusation, is mandated to proceed according to the administrative portion of the Administrative Procedure Act AS 44.62. The pertinent statutes within that portion require a written decision containing findings of fact (44.62.510) after a recorded hearing (44.62.450) on the evidence, according to the ordinary rules of burden of proof of judicial proceedings in the state (44.62.460). "If the order of the commission be unsupported by the evidence, it is, of course, void." Chicago, Rock Island R.R. v. U.S., 274 U.S. 29, 33 (1927).

The uncontroverted documentary evidence proves that Mr. DeNardo was terminated for not paying agency fees (R.99) that he did pay (R.84, 93, 94, 100). APEA and Mr. Murphy admitted Mr. DeNardo had paid (R.168, 140, L24 and L21, "identical facts") and the Labor Agency's findings confirmed the payments (R.103, 104). Contrary to its findings, the Agency upheld the termination (R.112). "When a local board acts in disregard of the law or without evidence to support its findings, it acts outside its jurisdiction." K & L Distributors v. Murkowski, 486 P.2d 351, 355 (Alaska Supreme Court 1971), citing Estep v. U.S., 327 U.S. 114 (1946).

> "But the statute gave the right to a full hearing, and that conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with the facts proved. A finding without evidence is arbitrary and baseless. And if the Government's contention is correct, it would mean that the Commission had a power

possessed by no other officer, administrative body, or tribunal under our Government. It would mean that where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficiently exercised in one case, could be injuriously exerted in another; is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power.

In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, quasi-judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to the "indisputable character of the evidence."

Interstate Commerce Commission v. Louisville and Nashville R.R., 227 U.S. 88, 91 (1912).

"The Commission's right to act depends upon the existence of this fact, and if there was no evidence to show that the rates were reasonable, there was no jurisdiction to make the order. . . . A finding without evidence is beyond the power of the Commission."

Interstate Commerce Commission v. Louisville and Nashville R.R., supra, page 92.

The Agency's Decision No. 39 (Appendix C) was heard by Mr. Steve Hafling and Mr. Morgan Reed (Appendix E-2, 3), but it was signed by Mr. Steve Hafling and Mr. Ronald Henry (Appendix C-11). Mr. Henry was the third member of the three-man agency who was absent from Mr. DeNardo's hearing of 10 October, 1978.

Affidavits submitted by Mr. Steve Hafling (Appendix F) and Mr. Morgan Reed (Appendix G) attest to the fact that Mr. Henry signed the decision as a convenience and did not hear or read the evidence. The Agency's statutory requirement under Alaska Statute 44.62.500(a)(2) states, "a member of the agency who has not heard the evidence may not vote on the decision." This is the same requirement stated in Morgan v. U.S. and adopted by the Alaska Supreme Court in Alaska Transportation Commission v. Gandia, 602 P.2d 402, 405 (1979).

The Agency violated the principles stated in Morgan v. U.S., 298 U.S. 468 (1936) as to the requirements of an administrative hearing.

> "A proceeding of this sort requiring the taking and weighing of evidence, determinations of fact based upon the consideration of the evidence, and the making of any order supported by such findings, has a quality resembling that of a judicial proceeding. Hence it is frequently described as a proceeding of a quasi-judicial character. The requirement of a "full hearing" has obvious reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts. The "hearing" is designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action. The "hearing" is the hearing of evidence and argument. If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given.
>
> There is thus no basis for the contention that the authority conferred by § 310 of the Packers and Stockyards Act is given to the Department of Agriculture, as a department in the administrative sense, so that one official may examine evidence, and another official who has not considered the evidence may make the findings and order. In such a view, it would be possible, for example, for one official to hear the evidence and argument and arrive at certain conclusions of fact, and another official who had not heard or considered either evidence or argument to overrule those conclusions and for reasons of policy to announce entirely different ones. It is no answer to say that the question for the court is whether the evidence supports the findings and the findings support the order. For the weight ascribed by the law to the findings - their conclusiveness when made within the sphere of the authority conferred - rests upon the assumption that the officer who makes the findings has addressed himself to the evidence and upon that evidence has conscientiously reached the conclusions which he deems it to justify. That duty cannot be performed by one who has not considered evidence or argument. It is not an impersonal obligation. It is a duty akin to that of a judge. The one who decides must hear.
>
> This necessary rule does not preclude practicable administrative procedure in obtaining the aid of assistants in the department. Assistants may prosecute inquiries. Evidence may be taken by an examiner. Evidence thus taken may be sifted and analyzed by competent subordinates. Argument may be oral or written. The requirements are not technical. But there must be a hearing in a substantial sense. And to give the substance of a hearing, which is for the purpose of making determinations upon evidence, the officer who makes the determinations must consider and appraise the evidence which justifies them. That duty undoubtedly may be an onerous one, but the performance of

it in a substantial manner is inseparable from the exercise of the important authority conferred.

Morgan, supra, pages 480-482.

D. VOID DECISIONS ARE SUBJECT TO COLLATERAL ATTACK AND HAVE NO RES JUDICATA EFFECT.

Any void decision may be collaterally attacked. Elliott v. Peirsol, 1 Pet 328 (1828); Thompson v. Tolmie, 2 Pet. 156 (1829); Wilcox v. Jackson, 13 Pet. 498 (1839). A void decision has no res judicata effect. Piedmont v. U.S., 280 U.S. 469, 476 (1930); Schlesinger v. Councilman, 420 U.S. 738, 746-748 (1975).

E. MR. DENARDO HAS A RIGHT TO TRIAL BY JURY.

The distinction between an equitable administrative remedy and an action at law by a unionized employee is delineated by the United States Supreme Court in Vaca v. Sipes, 386 U.S. 171 (1967).

In Mr. DeNardo's case, the State Labor Relations Agency lost its jurisdiction by rendering a void decision contrary to the Fourteenth Amendment. Mr. DeNardo availed himself of an action at law for conversion of his personal property interest in State employment.

> "The Seventh Amendment, for example, entitled the parties to a jury trial in actions for damages to a person or property, for liabel and slander, for recovery of land, and for conversion of personal property." (Emphasis added.)

Ross v. Bernhard, 396 U.S. 531, 533 (1970).

The Seventh Amendment is held inviolate in common law actions. Pernell v. Southall Realty, 416 U.S. 363, 370 (1974); Beacon Theatres v. Westover, 359 U.S. 500 (1959); Parsons v. Bedford, 3 Peters 432, 445, 446 (1830); Shields v. Thomas, 18 Howard 253, 262 (1855); Dimick v. Schiedt, 293 U.S. 474, 476 (1935).

There was never an issue in this case of the primary jurisdiction of the State Labor Relations Agency or of the

exhaustion of administrative or contractual remedies. The defendants, in their motions for summary judgment to the Superior Court and in their briefs and oral arguments before the Supreme Court, specifically state that the alternative remedies of an action at law or an administrtative hearing were available to Mr. DeNardo.

CONCLUSION

The record is evidence of the deprivation of Mr. DeNardo's property interest without due process of law under the Fourteeth Amendment and denial of trial by jury under the Seventh Amendment. This case need not even be set on the United States Supreme Court calendar for oral argument. This Court should reverse the judgment, granting Mr. DeNardo judgment on the liability with trial by jury on the damages.

RESPECTFULLY SUBMITTED, this _____ day of October, 1981.

DANIEL R. DENARDO
Box 682
Anchorage, Alaska 99510-0682

THE SUPREME COURT OF THE STATE OF ALASKA

DANIEL R. DeNARDO,

Appellant,

v.

PATRICK MURPHY, DIRECTOR, ALASKA PUBLIC EMPLOYEES ASSOCIATION; ALASKA PUBLIC EMPLOYEES ASSOCIATION; STATE OF ALASKA,

Appellees.

File No. 5631

MEMORANDUM OPINION AND JUDGMENT*

(No. 93 - July 28, 1981)

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Karl S. Johnstone, Judge.

Appearances: Daniel R. DeNardo, Anchorage, pro se. Patrick E. Murphy, Faulkner, Banfield, Doogan & Holmes, Juneau, for Appellees Alaska Public Employees Association and Patrick Murphy. Richard Monkman and Amy J. Stephson, Assistant Attorneys General, Anchorage, and Wilson L. Condon, Attorney General, Juneau, for Appellee State of Alaska.

Before: Rabinowitz, Chief Justice, Connor, Burke, Matthews and Compton, Justices.

The judgment of the superior court is affirmed.

*Entered pursuant to Appellate Rule 214.

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF ALASKA

DANIEL DeNARDO, Appellant, vs. PATRICK MURPHY, Director, APEA, ALASKA PUBLIC EMPLOYEES ASSOCIATION, and STATE OF ALASKA, Appellees.	)	Supreme Court No. 5631 O R D E R

Before: Rabinowitz, Chief Justice, Connor, Burke, Matthews, and Compton, Justices.

On consideration of the petition for rehearing filed August 10, 1981,

IT IS ORDERED:

The petition for rehearing is denied.

Entered by direction of the court at Anchorage, Alaska on August 27, 1981.

CLERK OF THE SUPREME COURT

ROBERT D. BACON

Filed and Entered
APPELLATE COURTS of the
STATE of ALASKA
AUG 27 1981
ROBERT D. BACON
By CLERK
Deputy

ccs: Justices
Counsel

A-2

Filed and Entered
APPELLATE COURTS of the
STATE of ALASKA
AUG 25 1981
ROBERT D. BACON CLERK
By Counsel Deput.

IN THE SUPREME COURT OF THE STATE OF ALASKA

DANIEL R. DeNARDO, Appellant, vs. PATRICK MURPHY, DIRECTOR, APEA, ALASKA PUBLIC EMPLOYEES ASSOCAITION, STATE OF ALASKA, Appellee.	Supreme Court No. 5631 O R D E R

On consideration of the appellant's request for more definite statement and request for polling of justices, filed August 7, 1981,

IT IS ORDERED:

1. The request for more definite statement is denied.

2. The request for polling of justices is denied.

Entered by direction of Chief Justice Jay A. Rabinowitz at Anchorage, Alaska on August 25, 1981.

CLERK OF THE SUPREME COURT

ROBERT D. BACON

ccs: Justices
Counsel

Note: The pending petition for rehearing will be the subject of an order at a later time.

A-3

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

DANIEL R. DeNARDO,

Plaintiff,

vs.

PATRICK MURPHY, DIRECTOR, APEA; ALASKA PUBLIC EMPLOYEES ASSOCIATION, STATE OF ALASKA,

Defendants.

Filed in the Trial Courts
STATE OF ALASKA THIRD DISTRICT
OCT 8 1980
CLERK OF THE TRIAL COURTS
BY KB DEPUTY

Case No. 3AN 80-2396 Civil

JUDGMENT AND ORDER

The court having granted summmary judgment in favor of defendants on September 2, 1980,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that this action is dismissed with prejudice.

IT IS FURTHER ORDERED that defendants Patrick Murphy and the Alaska Public Employees Association recover attorney's fees from plaintiff in the ~~amount of $~~ 300.00, and that defendant State of Alaska recover attorney's fees from plaintiff in the amount of $ 300.00.

DATED at Anchorage, Alaska, this 5 day of Oct, 1980.

Karl S. Johnstone
Superior Court Judge

I certify that on 10-10-80 a copy of this document was sent to:
☑ Attorney(s) of Record, or
☐ Other:
D.O.E. 10-10-80 KMC
Deputy Clerk
Rec'd Jnl.:

SEP 11 1980

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
420 L STREET, SUITE 100
ANCHORAGE, ALASKA 99501
PHONE 276-3550

The undersigned hereby certifies that on the 11th day of Sept. 1980 the attached document was mailed to the attorneys of record. DeNardo - Murphy

Joan M. Olsen

Subscribed and sworn to before me this date.

Donna Jean Ross
Notary Public
My Commission Expires 11/26/82

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APPENDIX B

State of Alaska
LABOR RELATIONS AGENCY
P.O. BOX 2322 • ANCHORAGE, ALASKA 99510
PHONE (907) 243-6955

C. R. "STEVE" HAFLING
CHAIRMAN
RONALD M. HENRY
MORGAN REED
—
JAMES R. LUCAS
CONSULTANT

JAN 16 1979

January 8, 1979

ORDER AND DECISION NO.39 IN A MATTER OF AN UNFAIR LABOR PRACTICE CHARGE BY DANIEL DENARDO AGAINST ALASKA PUBLIC EMPLOYEES ASSOCIATION AND THE STATE OF ALASKA.

FINDINGS OF FACT

(1) Section 23.40.110, Unfair Labor practices, of the Public Employment Relations Act of the State of Alaska reads in pertinent part as follows:

> "(b) Nothing in this chapter prohibits a public employer from making an agreement with an organization to require as a condition of employment
>
> (1) membership in the organization which represents the unit on or after the 30th day following the beginning of employment or on the effective date of the agreement, whichever is later; or
>
> (2) payment by the employee to the exclusive bargaining agent of a service fee to reimburse the exclusive bargaining agent for the expense of representing the members of the bargaining unit." (Emphasis added.)

(2) The bargaining agreement in question expired on December 31, 1976; the following agreement was signed on May 2, 1977, and by its terms, was retroactive to January 1, 1977.

(3) This kind of time frame is the rule rather than the exception in Alaska public bargaining because of the exigencies of legislative sessions and the budgetary process.

(4) Mr. Patrick L. Hunt, Director, State of Alaska's Division of Personnel/Labor Relations, advised Mr. Patrick Murphy in a letter dated July 21, 1978, that, "To the best of my know-

ledge, APEA was never advised that the contract was extended or cancelled. Most of the provisions of the agreement were in fact continued." Provisions of the agreement which remained in effect between January 1, 1977 and May 2, 1977 included the grievance procedure and a dues checkoff.

(5) Negotiations were actively continued during this period and APEA actively engaged in bargaining on behalf of members of the unit concerned.

(6) The chronology of events leading to the termination of Mr. DeNardo on April 21, 1978, was as follows:

June 1, 1976. Mr. DeNardo requested that his name be remove from the automatic payroll deduction list for APEA dues, as he planned to make his payments directly to APEA.

June 1, 1976-August 29, 1977. Mr. DeNardo paid no dues duri this period, but received a reminder on April 26, 1977, and a notice that failure to pay dues would result in termination on August 15, 1977. The August letter referr d to $208.00 in back du

August 30, 1977. Mr. DeNardo paid $192.00 to the APEA Anchorage office. His receipt stated that this amount covered dues owed from January through December, 1977, as did the APEA ledger (DeNardo Exhibit No. H-1).

September 1, 1977- January 30, 1978. Mr. DeNardo paid no dues during this period. He received notices of dues owed on September 21, 1977 and January 19, 1978.

January 31, 1978. Mr. DeNardo paid $16.00 to APEA, and received a receipt which stated that this amount covered dues for January, 1978.

////

March 2, 1978. Mr. DeNardo paid APEA $16.00, and received a receipt stating that this amount covered dues for February, 1978. On March 22, 1978 Mr. Hunt notified Mr. DeNardo, by letter that non-payment of dues owed would result in his termination on April 21, 1978.

April 17, 1978. Mr. DeNardo paid APEA $16.00, and received a receipt noting that this amount covered dues for March, 1978.

On April 21, 1978, Mr. DeNardo was terminated.

(7) At a hearing of the Labor Relations Agency on October 10, 1978, it was suggested that in order to mitigate potential liability to the respondent and losses by the complainant, that Mr. DeNardo be put back to work without prejudice to his pending charge. This was done.

(8) On October 19, 1978, Mr. DeNardo paid APEA $112.00, and received a receipt which noted that this amount was in payment of back dues.

CONTENTIONS OF THE PARTIES:

The State of Alaska:

No brief was filed by the State of Alaska in this matter.

Alaska Public Employees Association:

The APEA argues first that Mr. DeNardo appears to be claiming that he owes dues for neither the period of June, 1976-December, 1976, nor for the period January 1, 1977-May 2, 1977.

The Association contends that Mr. DeNardo voluntarily paid dues of $192.00 on August 31, 1977, to cover the period January 1, 1977 through December 31, 1977, and he cannot now be allowed to claim that he owed no dues during part of this year (January 1, 1977-May 2,1977).

The Association contends that Mr. DeNardo owed dues during the period January 1, 1977-May 2, 1977, because the agreement between the parties was never expressly terminated. The Association contends that notice of intention to modify or amend the agreement does not constitute express termination, and cites several cases to support its contention. The Association points out that the agreement signed May 2, 1977 was retroactive to January 1, 1977 in effect, except as to "new substantively different provisions".

The Association argues that there is no evidence that Mr. DeNardo paid his dues under protest.

The Association contends, that even assuming for the purposes of argument that Mr. DeNardo did not owe dues for the period of January 1, 1977-May 2, 1977, he was lawfully terminated because he owed $112.00 in back dues for the period June 1976-December 1976 The amount owed for the period January 1, 1977-May 2, 1977 is $64.00.

The Association argues that the union security provisions under the two agreements are identical, and that the State did not vary its actions toward this provision at any time. Therefore, contends the Association, this clause has been treated by the parties as a direct continuation of the clause in the earlier agreement.

The Association responded to several points made by Mr. DeNardo during the hearing of October 10, as follows:

(1) 30 day grace period. The Association points to the language of Section 1, Article 9 of both agreements, which provide for one 30-day grace period, which begins immediately following

the date of hire. Mr. DeNardo has been working since 1975, and is clearly entitled, argues the Association, to only one 30-day grace period.

(2) APEA Records. The Association points out that its records are audited each year by several groups which include an outside C.P.A. firm. In addition, the Association contends that Mr. DeNardo has introduced no evidence which shows that his record were erroneous.

(3) State of Alaska liability. The Association contends tha the State of Alaska has no liability in this matter, as it acted properly in terminating Mr. DeNardo.

The Association summarizes by stating that a union seeking to enforce a union security provision against an employee has an obligation to deal fairly with that employee. Such fairness includes notice to the employee, who may then take steps to protect his job. The Association argues that it has dealt fairly with Mr DeNardo, as evidenced by its correspondence with him.

Daniel DeNardo, Complainant:

Mr. DeNardo argues that there are important legal distincti between the obligations of members of the Association and non-mem bers, such as himself.

Mr. DeNardo contends that he did in fact protest payment of his dues on August 30, 1977, and points to Exhibit C, attached to his brief to support this contention.

Mr. DeNardo also argues that, since his reinstatement he ha been required to pay $112.00, which represents "fees doubly asses against the expired contract period 1975-1976." This amount, contends Mr. DeNardo, represents a fine, and discharge based on a

failure to pay fines is unlawful, according to decisions of the NLRB. In addition, Mr. DeNardo argues that the acceptance by the union of dues prohibits the union from demanding the employee' discharge.

Mr. DeNardo argues that the APEA request to negotiate a new agreement, dated September 16, 1976 forestalled automatic renewal of the 1975-1976 agreement, and therefore, that agreement expired on December 31, 1976. Mr. DeNardo cites several cases to support this contention.

Mr. DeNardo contends that the effective date of the current agreement was May 2, 1977, rather than January 1, 1977, and therefore, there was a four month period in which no agreement was in effect between the parties. (January 1, 1977-May 2, 1977.) Since there was no agreement in effect during this period, there could be no obligation on the employees to pay dues. Mr. DeNardo cites a number of cases to support this argument. Mr. DeNardo contends that he has, then, overpaid dues in the amount of $64.00 for this period, and this overpayment was protested by him.

Mr. DeNardo argues that the payment he made in August, 1977 was misapplied by APEA. He contends that this payment was applie to the "expired 1976 contract period". Such an application, argu Mr. DeNardo ignores Federal case law and NLRB decisions.

Mr. DeNardo argues that he is entitled to a 30-day grace period, because of his status as a non-member of the Association. This period, contends Mr. DeNardo, began the day the new agreeme was signed, May 2, 1977.

Mr. DeNardo contends that his discharge was caused by faul record-keeping on the part of the Association. He refers to seve

exhibits attached to his brief to support this contention.

In summary, Mr. DeNardo contends that he has overpaid his agency fees, as he had no obligation for such fees during the period January 1, 1977-May 2, 1977, and for a period of 30 days after May 2, 1977.

CONCLUSIONS:

Mr. DeNardo argues that the acceptance of his dues by the Association prohibits his discharge for failure to pay dues. The cases cited to support this argument are very different factually from the situation at hand. For example, Colgate-Palmolive Co., 51 LRRM 1177, involved an employee who became delinquent on June 12. By July 13 of the same year, she had received notice of the union's request for termination. She went to the union office on July 15, and paid all dues owed, plus assessed fines. It was found that under these circumstances, which included the fact that the employer had knowledge of the union's acceptance of the total amount owed, her discharge was unlawful. In F.J. Burns Draying, Inc., 46 LRRM 1531, which was also cited by Mr. DeNardo, the union had not only accepted from the employee in question the total amount owed, but had formally notified him that he was to be reinstated. The union then decided that notification had been "in error", and attempted to have the reinstatement blocked. In neither case is the situation similar to Mr. DeNardo, who has received a variety of notices informing him of the amount owed, after he had made a partial payment. He was well aware of the Association's statement of the total, unlike the situation in the cases cited.

Mr. DeNardo contends that there was in fact no agreement in

effect during the period January 1, 1977-May 2, 1977. He cites several cases to support this argument. As the Association notes in its brief, several of the cases cited by Mr. DeNardo deal with the circumstances under which a contract will or will not bar an election. Contract-bar rules are extremely complex, and rigidly adhered to: they deal with a very select and narrow set of circumstances and are not relevant to the situation at hand Mr. DeNardo recognizes this fact on page 6 of his brief, when he is analyzing the effect of notice to modify on the termination of an agreement.("...prevents its renewal for contract-bar purposes...") (Emphasis added.)

Both parties cited cases supporting their contention that the agreement had or had not been extended during the period of negotiations. Both parties submitted various pieces of correspondence to support their arguments. The evidence is fairly evenly divided between the two points of view, until it is noted that the cases cited were decided under the National Labor Relations Act, which contains no provision similar to that of Section 23.40. of the Alaska Public Employment Relations Act, which states that nothing in that Act shall prohibit

> "a public employer from making an agreement with an organization to require as a condition of employment
>
> ...
>
> payment by the employee to the exclusive bargaining agent of a service fee to reimburse the exclusive bargaining agent for the expense of representing the members of the bargaining unit." (Emphasis added.)

Such an agreement was clearly made. Both the 1975-76 and 1977-79 agreement use identical language in the provisions covering the agency shop.

The cases cited under the National Labor Relations Act are concerned with enforcing the Taft-Hartley amendments to prevent illegal union shop provisions, and deals in no way with the agency shop. The APERA does contain the language cited above, to repeat:

> "...payment by the employee...to reimburse the exclusive bargaining agent for the expense of representing the members of the bargaining unit." (Emphasis added.)

There is no question that the Alaska Public Employees Association was continuing during the period of January 1, 1977-May 2, 1977 to represent employees in the unit and is entitled to be reimbursed for the expense of doing so.

Mr. DeNardo contends that he is entitled to a thirty-day period, after the signing of the agreement on May 2, 1977, before dues were owed and payable. The language of both agreements is clearly contrary to this argument. The agency shop provision states that: "Payment of APEA dues or agency fees shall commence within thirty (30) days after the date of hire." Mr. DeNardo states in his brief that he has been employed by the State of Alaska since 1974. The thirty-day grace period applies to newly-hired employees. Mr. DeNardo cites several cases in support of his argument, but appears to have misread the findings of those cases. For example, Paragon Products revolved around the circumstances under which a contract containing a union-security provision would act as a bar to an election. It was found that a contract with a clearly illegal union security provision would not act as such a bar. Such an illegal provision would be one which "specifically withholds from incumbent nonmembers or new employees the statutory 30-day grace period." (134 NLRB 663). This does not mean that statutory 30-day grace periods are to be given

to nonmember employees each time a new contract is signed, as Mr. DeNardo appears to interpret it. It means that an agreement which states on its face that nonmember employees and/or newly hired employees shall not be given a thirty-day grace period before union dues are owed, will not act as a bar to an election.

Mr. DeNardo appears to be arguing that the dues which he owed under the 1975-76 agreement (June 1976-December 1976) can no longer be paid by him. This is the only interpretation possible from his argument as to the misapplication of his dues. As the Association points out in its brief, such a position is untenable. Mr. DeNardo cites no support for his argument that the new agreement has somehow eradicated his obligation to pay dues owing from the previous year.

According to Mr. DeNardo's apparent calculations, during the period June, 1976-March, 1978, he is responsible for dues covering only nine of those twenty-one months. This is because of his deductions of one thirty-day grace period; four months when in his opinion no agreement was in effect, and dues were not owed; and the seven months in 1976, which he no longer was liable for because the agreement terminated on December 31, 1976.

According to our calculations, with his payment of $112.00, on October 19, 1978, Mr. DeNardo has now paid his obligations to APEA through March 1978, and is therefore no longer in arrears. At the time of his termination, however, he was substantially behind in his payments.

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ORDER AND DECISION NO. 39

It is determined that Daniel DeNardo was terminated for cause on April 21, 1978, and was rehired in October, 1978, as a new employee, upon payment of delinquent agency shop fees. Since he was discharged for just cause, the relief he requests is denied, spefically as listed below:

a. rights, benefits and priveleges of employment, other than those which would accrue to any new employee;

b. back wages, plus interest for the period of termination;

c. legal expenses.

SIGNED: C. R. "Steve" Hafling

C.R. "Steve" Hafling, Chairman

SIGNED: Ronald M. Henry

Ronald M. Henry, Member

SIGNED: _____

Morgan Reed, Member

IN THE SUPREME COURT OF THE
STATE OF ALASKA

81 5566

DANIEL R. DENARDO,

Appellant, In Propria Persona,

vs.

PATRICK MURPHY, DIRECTOR, A.P.E.A., ALASKA PUBLIC EMPLOYEES ASSOCIATION, STATE OF ALASKA,

Appellees.

No. 5631

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Daniel R. DeNardo, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Alaska, affirming the dismissal of the complaint, entered in this action on 27 August, 1981.

This appeal is taken pursuant to 27 U.S.C. Sec. 1257(2).

Daniel R. DeNardo
DANIEL R. DENARDO

APPENDIX D

81 5566

HEARING OF

ALASKA STATE LABOR RELATIONS AGENCY

* * *

HEARINGS OF:

ULPC - 78 - 8 Unfair Labor Practice

Filed by Daniel R. DeNardo

vs.

STATE OF ALASKA

BOARD MEMBERS:

JAMES R. LUCAS, Mediator
RON HENRY, Acting Chairman
MORGAN REED, Member
STEVE HAFLING, Member
ANN SONTAG SCHWARZ, Executive Director

* * *

Alaska Court Reporting Services
700 H St.
278-4733 Anchorage, Alaska 278-4918

APPENDIX E

P-R-O-C-E-E-D-I-N-G-S

MR. HAFLING: Good morning, this is a hearing before the Alaska State Labor Relations Agency, Unfair Labor Practice No. 78 - 8. It's filed by Daniel R. DeNardo.

Before we begin, I'd like to introduce the members of the Board. On my right, is Mr. Morgan Reid, Skagway, long-time member of the Board, former State Legislator. My name is Steve Hafling, Chairman of the Board, Anchorage. On my left, is Mr. Jim Lucas, San Francisco, Labor Relation's consultants to the Board, and on his left, is Ann Schwarz, Executive Assistant. Representing APEA this morning is Pat Murphy, and representing the State of Alaska, Bruce Ludwig, Division of Personnel.

These hearings are conducted informally. We don't stick to any Rules of Court; we merely try to discuss the problem on hand and arrive at an intelligent decision. And so with that, we'll ask that Mr. DeNardo start, because you're the one who filed the complaint, and I'd ask the other participants to stop at any time and cross-examine or discuss the problem as we go along.

MR. DENARDO: Okay. Now, I'm going to submit some exhibits, but what I did is, I had to make copies for, you know, for the people here. Is it okay

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

DANIEL R. DeNARDO,

Plaintiff, pro se,

vs.

PATRICK MURPHY, DIRECTOR, APEA: ALASKA PUBLIC EMPLOYEES ASSOCIATION, STATE OF ALASKA

Defendants.

Case No. 3AN 80-2396 Civil

AFFIDAVIT OF C. R. "STEVE" HAFLING

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

I, C. R. "Steve" Hafling, on oath depose and say:

1. I am Chairman of the State Labor Relations Agency and have been since September 1972.

2. On October 10, 1978, I and Morgan Reed sat as the Labor Relations Agency in a hearing involving an unfair labor practice charge brought by Daniel DeNardo against the Alaska Public Employees Association and the State of Alaska. The case involved the question of whether Mr. DeNardo had been properly terminated from state employment due to the nonpayment of union dues.

3. Immediately following the hearing, Mr. Reed and I met and discussed the case. We decided against Mr. DeNardo and in favor of the respondents on all points and requested James Lucas, our consultant, to draft a written opinion.

4. When the written decision was completed (Order and Decision No. 39) Mr. Reed was in Mesa, Arizona. Our secretary Ann Schwarz talked to him about the decision and she informed me that he agreed with it in all respects. I later discussed the case with Ron Henry, the third member of the Labor Relations Agency, and since Mr. Reed was not

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH

APPENDIX F

APEA 310

available, I asked Mr. Henry to sign the order and decision as a matter of convenience.

5. Any contract that Color Art Printing has had to provide the State of Alaska with envelopes was awarded to Color Art because it submitted the lowest bid. This year, Color Art's bid was not the lowest so it was not awarded the contract.

DATED at Anchorage, Alaska, this 5 day of August, 1980.

C. R. "Steve" Hafling

C. R. "Steve" Hafling

SUBSCRIBED AND SWORN TO before me this 5 day of August, 1980.

Constance J. Chambers

Notary Public in and for Alaska
My Commission expires: 3/21/82

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
420 L STREET, SUITE 100
ANCHORAGE, ALASKA 99501
PHONE: 272-[illegible]

The undersigned hereby certifies that on the 12th day of August 1980 the attached documents were mailed to the attorneys of record. De Nardo & Murphy

Joan M. Olsen

Subscribed and sworn to before me the date last written.

Notary Public 8/6/82
My Commission Expires

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

DANIEL R. DeNARDO,

Plaintiff, pro se,

vs.

PATRICK MURPHY, DIRECTOR, APEA: ALASKA PUBLIC EMPLOYEES ASSOCIATION, STATE OF ALASKA,

Defendants.

Case No. 3AN 80-2396 Civ.

AFFIDAVIT OF MORGAN REED

STATE OF ALASKA)
) SS.
FIRST JUDICIAL DISTRICT)

I, Morgan Reed, on oath depose and say:

1. I am a member of the State Labor Relations Agency and have been since 1971.

2. On October 10, 1978, myself and C. R. "Steve" Hafling sat as the Labor Relations Agency in a hearing involving an unfair labor practice charge brought by Daniel DeNardo against the Alaska Public Employees Association and the State of Alaska. The case involved the question of whether Mr. DeNardo had been properly terminated from state employment due to the nonpayment of union dues.

3. Immediately following the hearing, Mr. Hafling and I met and discussed the case. We decided against Mr. DeNardo and in favor of the respondents on all points and requested James Lucas, our consultant, to draft a written opinion.

4. When the written decision was completed, (Order and Decision No. 39) I was in Mesa, Arizona. A copy of the decision was initially sent to my home in Skagway, Alaska, and then forwarded to me in Mesa.

5. Some time after receiving the opinion in Arizona, I received a phone call from Ann Schwartz,

the agency's secretary, concerning the decision. I informed Ms. Schwartz at that time that I was in total agreement with the decision as it was drafted.

DATED at Skagway, Alaska, this 6 day of August, 1980.

Morgan Reed

SUBSCRIBED AND SWORN TO before me this 6 day of August, 1980.

Notary Public in and for Alaska.
My Commission expires: ~~My Commission Expires 5-28-82~~

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE, BRANCH
620 L STREET, SUITE 100
ANCHORAGE, ALASKA 99501
PHONE: 276-3550

The undersigned hereby certifies that on the 12th day of August 1980 the attached document was mailed to the attorney/of record Pacher De Naido-Murphy

Joan M. Olson

Subscribed and sworn to before me the date last written.

Donna Jean Ross
Notary Public
My Commission expires 11/26/82

G-2
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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

DANIEL R. DE NARDO,

Plaintiff,

vs.

PATRICK MURPHY, DIRECTOR, APEA, ALASKA PUBLIC EMPLOYEES ASSN., STATE OF ALASKA,

Defendants.

No. 3AN 80-2396 CIV.

VOLUME I

TRANSCRIPT OF ORAL ARGUMENT ON DEFENDANT'S MOTION TO DISMISS, GRANTED

BEFORE THE HONORABLE KARL S. JOHNSTONE
Superior Court Judge

Anchorage, Alaska
August 21, 1980
3:40 o'clock p.m.

APPEARANCES:

FOR THE PLAINTIFF: DANIEL R. DE NARDO
In propria persona
Box 682
Anchorage, Alaska

FOR DEFENDANT APEA: PATRICK MURPHY
Attorney at Law
425 G Street
Anchorage, Alaska

FOR DEFENDANT STATE OF ALASKA: AMY STEPHSON
Assistant Attorney General
420 L Street
Anchorage, Alaska

Alaska Court System

APPENDIX H

PROCEEDINGS

THE CLERK: The superior court for the third district with the Honorable Karl Johnstone presiding is now in session.

THE COURT: You may be seated. This is the time on hearing on a motion to dismiss in Daniel R. DeNardo, plaintiff, representing himself pro se; Patrick Murphy, director of APEA, Alaska Public Employees Association, State of Alaska, defendants, case 80-2396. It appears that Mr. DeNardo is here pro se; and counsel for the defendants, would they please state their names.

MS. STEPHSON: Okay. Your Honor, my name is Amy Stephson. I'm from the attorney general's office and I'm representing the state.

MR. MURPHY: Your Honor, I'm Patrick Murphy. I'm representing myself as former executive director and I'm representing Alaska Public Employees Association.

THE COURT: Mr. Murphy, I don't know if it's significant or not but I'm not so sure you're legally entitled to act as counsel for the Alaska Public Employees Association. You are entitled to represent yourself in this matter, but I think that our statutes prohibit -- are you an attorney, incidentally?

MR. MURPHY: Yes, I am, Your Honor. I'm.....

THE COURT: Are you licensed to practice in the state?

MR. MURPHY: Yes, I'm now with the law firm of Foster, Banfield, Dugan and Hahn.

THE COURT: Okay.

MR. MURPHY: We're the retained counsel for the Alaska Public Employees Association.

THE COURT: Very well. I was unaware of that. That's fine. Mr. DeNardo, you have the burden of proof -- excuse me. The state (indiscernible) and Mr. Murphy has the burden of proof in this case. You can proceed.

MR. MURPHY: Yes, Your Honor. We intend to rely pretty much on our -- what -- our pleadings and our motion to dismiss and especially also the state's reply memorandum to Mr. DeNardo's opposition, although I would like to highlight a few points depending on the amount of time the court wants to devote to this. The -- on April 10th, the plaintiff in this action, Mr. DeNardo, sued the Alaska Public Employees Association, its former director, and the State of Alaska for damages in excess of one million dollars alleged -- arising out of an alleged unlawful dismissal. The facts in the case are set out in the agency's order, decision number 39, in detail. The important facts were that on April 21st, 1978, Mr. DeNardo was terminated from his state employment by the state of Alaska and APEA for failure to pay his agency fees. Shortly thereafter the plaintiff in this case filed an unfair labor practice charge with the Alaska State Labor Relations Agency. On October 10th, the agency heard those charges and also at that hearing it was agreed between the parties that Mr. DeNardo would be given an opportunity to have -- to retain -- to have his state employment again pending a decision of the agency. On January 8th,

1978, the agency in order and decision number 39 ruled that Mr. DeNardo had been terminated for cause and that was the agency's decision very briefly. Now, it's our contention and we -- both APEA and the state argued in their motion to dismiss that the plaintiff had failed to file a timely appeal under Rule 45 from the agency's order and decision and therefore the -- this action was barred by administrative res judicata. The -- it's our contention that -- I think....

THE COURT: Those are two different arguments, aren't they, Mr. Murphy? One's the failure to file timely appeal and res judicata?

MR. MURPHY: Yes, Your Honor.

THE COURT: Okay.

MR. MURPHY: It's our contention that there was a procedure set out in the statute which -- and that called for -- that allowed Mr. DeNardo, if he disagreed with the agency's decision, he had thirty within which to appeal that decision. He failed to appeal that decision. In the present complaint it's our contention that he is seeking to litigate the identical facts and law which he argued in the proceeding on October 10th, 1978. I think a review of the transcript which was attached of the agency proceeding and a review of the brief filed by Mr. DeNardo in that case will show that what we're talking about is the identical facts and law which were argued in that particular matter. The agency ruled on that matter and it's our contention that his remedy was to -- was an

appeal under Rule 45. Having not appealed, it's our contention that he is barred by administrative res judicata and I think that both the U.S. supreme court and authorities in the area like Professor Davis and also the Alaska supreme court in Jefferies versus Glacier State Telephone Company recognize this rule in administrative proceedings. For example, in the Jefferies case the court stated: Although the principles of the issue of preclusion have been developed in the judicial setting we agree with the modern and now generally accepted view that the doctrine of res judicata may be applied to adjudicative determination by administrative agencies. Mr. DeNardo has attacked in his opposition the argument that we've made basically by saying -- he has made a collateral attack on the agency's decision. The -- it's well established in Alaska that in order for a collateral attack on a judgment to succeed that judgment must be void. The -- normally the grounds for deeming a judgment void is lack of jurisdiction over the subject matter, lack of jurisdiction over the person, or failure to have some form of essential notice. In going over the pleadings filed by Mr. DeNardo, I believe that the plaintiff has in his collateral attack on the agency decision has collaterally attacked it on three grounds. The first ground is that the decision was not based on facts and is contrary to law. The second grounds was that the agency was unlawfully constituted due to a conflict of the agency chairman. And the third ground is that the agency's decision was not made by the necessary two members who heard the evidence. On the first ground which is that the decision

Alaska Court System

is not based on fact and is contrary to law, I think that can be answered pretty simply. I think the state of the law is that a decision is not void simply because it may or may not be based on inadequate evidence or erroneous rulings. The -- I think the agency, if we were litigating the facts and -- re-litigating the facts and the law in this case, I think it would be found that the agency in fact did make a correct decision but that is certainly not I think what -- I don't -- it's our contention that the plaintiff has no right to re-litigate the facts and the law in this case, and one -- at least one of his collateral attacks on that decision is based on a lengthy argument of various cases -- NLRB cases -- which also he argued those very same cases before the agency. The agency considered those cases in their order and decision and at a number of points quoted from the cases, distinguished the cases and made their ruling. And so I don't think -- it's our contention that it's not a proper -- it's not proper at this point for the plaintiff to be rearguing the facts and the law. The second ground that the agency's decision is attacked on is that the agency was unlawfully constituted due to a conflict of interest on the part of its chairman, Mr. Steve Hafling. The plaintiff's basic contention is that Mr. Hafling failed to disclose a contract on his conflict of interest statement in which -- a contract -- he owned Color Art Printing, and Color Art Printing was a printing business, and he was the low bidder on a contract in 1978 for envelopes for the state of Alaska. It's the plaintiff's

contention that the failure to disclose this on the conflict of interest statement somehow renders the agency's decision void. I think the court has already ruled on that kind of a contention in Alaska Community College Federation of Teachers versus the State Labor Relations Agency in 1979. There the court already rejected the argument that Mr. Hafling's state contract per se makes him biased in performing this duties. I don't want to spend a lot of time on this particular matter because I don't think it's of particular significance but I would point out one other point which is well pointed out in the state's reply memorandum, and that is that the decision was rendered on January 8th, 1979, and the conflict of interest statement was filed on February -- was dated February 15th and date stamped at the APOC on Feburary 20th. It's a little difficult to base an argument on failure to disclose in a conflict of interest statement when the decision was rendered before that statement was filed. So -- but I think enough said on that particular point. The third ground is that the plaintiff -- well, just one more point on that. Additionally even -- even if this were not the case, if you'll review Chairman Hafling's statement, it shows that the reason he was awarded the contract was because he was the low bidder for that envelope contract. It just so happens in 1979 he was not the low bidder and therefore he didn't get the contract. So I really don't think that the second point has much merit. Finally, the plaintiff contends that the agency's decision is void because two members of the agency

who conducted the hearing did not decide the case. If you will review the affidavit by Chairman Hafling and also by Mr. Morgan Reed, at that hearing which I happened to have been at, the two members of the board which were present were the chairman Steve Hafling and also board member Morgan Reed. They heard the evidence and the -- both their affidavits bear out that they then decided the case that day, instructed the consultant to the board, Mr. Jim Lucas, to write the opinion. The opinion was then forwarded to Mr. Reed who was in Arizona at the time. He reviewed the decision, told the secretary of the board that it was acceptable and the decision was signed by the chairman, Mr. Hafling, and by Mr. Ron Henry on behalf of Morgan Reed. So the decision of the agency as far as we're concerned was in compliance with the statutes. Two members of the board heard the evidence and the members who had heard the evidence decided the cases. So I think that the -- all three grounds for collateral attack are not valid. I don't think we're dealing -- we're not dealing with a case here of lack of jurisdiction either over the person, subject matter, or lack of notice, which are the standard grounds. Mr. DeNardo voluntarily invoked the jurisdiction of the board when he filed his unfair labor practice -- he had a full opportunity to present his case. He did present his case. The board ruled against him. He then had an opportunity to appeal under Rule 45. He didn't do that. And approximately a year and a half later he filed a complaint for a million dollars alleging the same facts and law

which had been decided by the board. So we believe that this matter is subject to dismissal.

THE COURT: Thank you. Ms. Stevens (ph), you want to add anything?

MS. STEPHSON: No, I don't think it's necessary, Your Honor. Anything else I would say is already in our memos, unless you have any questions, I'd be happy to answer, or perhaps we could just wait for rebuttal after Mr. DeNardo speaks.

THE COURT: Yes, I will wait. Mr. DeNardo.

MR. DeNARDO: Thank you, Your Honor. I think the law would bear me out in what I state that the true issue before the court is the matter of due process. The Alaska supreme court -- the defendants have continued -- left out one vital factor in the determination of whether the decision is void. The Alaska supreme court in a Aguchak versus Montgomery Ward specifically pointed out as well as all the cases that the defendants have cited in their memorandums I would adopt right now in front of the court because all of those cases particularly follow Aguchak versus Montgomery Ward in that a decision is void is -- if due process has been denied the litigant.

THE COURT: Mr. DeNardo, were you given an opportunity to be heard and did you not in fact appear at the hearing?

MR. DeNARDO: Yes, Your Honor, that is correct.

THE COURT: In Aguchak versus Montgomery Ward that was a case of small claims where somebody living in a village was served

and requested to appear -- required to appear in Anchorage to defend a small claims, and they said that was not giving the defendant due process, making him come several hundred miles to defend a small claim.

MR. DeNARDO: That's correct, Your Honor.

THE COURT: I think there's a significant difference there. The underlying facts in Aguchak are significantly different than the underlying facts in this case.

MR. DeNARDO: Well, I'm going to get to that point of why I think Aguchak particularly applies to my case as to the one specific point, denial of due process.

THE COURT: Okay.

MR. DeNARDO: I would call the court's attention to the case -- Alaska supreme court -- of Jager versus the State, that's 537 P.2d, starting at page 1100 where the court has held that in looking at an administrative decision you have some tests that have to be applied. The first test would be the standard substantial evidence test for questions of fact and the second test would be the reasonable basis test for -- that the decision would be substantiated by law.

THE COURT: Mr. DeNardo, isn't that -- isn't that a subject for appeal though? Wouldn't that be something the superior court would review on appeal from the administrative decision? Whether or not there was substantial evidence or there was an error in the law applied to the evidence?

MR. DeNARDO: That's correct, Your Honor. In the case here we've heard -- my contention in my memorandum has been when I de -- and I detailed it quite thoroughly I felt -- was that the decision that -- rendered by Mr. Hafling and the board was contrary to all federal case law and NLRB decisions and their findings of fact do not correspond and do not -- are not substantiated by the documentary evidence that was submitted.

THE COURT: Let's assume that to be true, Mr. DeNardo. Wouldn't your proper remedy be an appeal from the administrative determination?

MR. DeNARDO: Not when there's a void decision. And voidness can be -- and voidness -- one of the determining factors of voidness is when the administrative or a judicial -- a court rules and bases a decision upon no fact and no law. And this -- I attached a separate memorandum on void decisions specifically pointing that out. And I will get to that as to the consti -- the illegal constitution of this board that rendered the decision. I'll continue with my argument as far as Jager is concerned and also I'll address any questions the court would have. Okay. The reasonable basis test, like I said, they completely failed in this. I had no -- I had no obligation to appeal a void decision. That's a matter of law. And I'm maintaining, like I said, that this decision was void because it was contrary to all the facts, and I do mean all the facts. It was contrary to all the law and it was rendered by a board that was illegally constituted.

THE COURT: Mr. DeNardo, if this court were to make a ruling -- just hypothetically in your case -- based on none of the evidence presented and absolutely contrary to law, you remedy would be on appeal to the supreme court. It wouldn't be to just forget about the appeal, let a year go by and then file another action in this court.

MR. DeNARDO: I disagree with His Honor. If you take a look at my memorandum, I think cited very definitely the authoritative sources showing that I have no obligation to appeal a void decision. A void decision is -- Freeman on Judgment specifically states that a void decision is a nullity and it has no effect whatsoever.

THE COURT: You're talking about subject matter jurisdiction. If the court doesn't have jurisdiction in the first place and I don't find anything in the record here to show that the administrative agency didn't have jurisdiction.

MR. DeNARDO: But the administrative agency or a court can have jurisdiction but can lose that jurisdiction and one of the ways they lose jurisdiction is where they adjudicate contrary to the facts and the law and I point that out in my memorandum on void judgments. I think what we're dealing with here is --and I'll quote the Alaska constitution, Article I, Section 1. The constitution is dedicated to the principles that all persons have a natural right to life, liberty and the pursuit of happiness and the enjoyment of the rewards of their own industry, and I was a permanent employee of the state of Alaska. I had outstanding

evaluation. Under the law -- okay. Perry versus Sinderman (ph), 408 U.S. at page 593, and The Board of Regents versus Roth (ph), 408 U.S. page 564, both 1972 cases, specifically pointed out that when you're dealing with a public employee who has met the requirements for permanent status, that he does have a property right and he is eligible and due process must be shown. Now, in Breeze (ph) versus Smith, the Alaska supreme court specifically stated that when it comes to the ajudication -- when it comes to -- right here -- the court holds itself to a high standard of vig -- vigilance in the matter of protection of an individual's constitutional liberties. And here the court established that there must be a compelling interest standard that must be looked to when a person's constitutional right -- in this case my property in the job as a permanent state employee -- has been violated for an alleged lack of due process. Now, I can prove the lack of due process in this case. Okay. Now, one other case here. Okay. Another thing I'd like to quote to the court which I'm sure the court is very familiar with is Article I, Section 7 of the Alaska constitution. No person shall be deprived of life, liberty, or property without due process of law. And as I pointed out in my memorandum on void judgments you have to do something more than just hold a hearing, take in the evidence, and go through the motions because a decision has to be looked to as to what it was based upon. And contrary to the argument about whether this would have to come on an appeal or in -- in a collateral attack,

that's where a void decision is attacked. It's in a separate proceeding and it's collaterally attacked. Now, in my memorandum I -- I don't know if Your Honor had a chance to look at it but I'm the one -- I submitted fifty-eight pages of documents and I point out in detail where this board ignored the facts. I have the receipts there, the signed receipts, paid in cash for all my dues. And we're talking about a very basic principle of labor law called the automatic renewal clause. The 1976 contract -- '75, '76 contract between APEA and the state of Alaska expired. Mr. Murphy and the APEA threatened me with termination if I didn't come back -- now, this was in 1977 they sent this letter to me -- mind you, there were no demands in 1976 for my dismissal, no demands whatsoever that I come up with any dues in arrears for 1976.

THE COURT: Wait a second, Mr. DeNardo, we can go on all day about your assertions of the facts that may have taken place at the hearing. Assuming all that to be true, assuming that.....

MR. DeNARDO: Okay.

THE COURT: .....the agency made a terrible error and they just ignored all these facts, you were present and you were given notice and opportunity to be heard. So where is the denial of due process?

MR. DeNARDO: The denial of due process is a matter of fact that the decision is not based upon any law or facts.

THE COURT: Well, don't you think that would be a proper

subject for appeal to the superior court?

MR. DeNARDO: If a person chose to appeal it, but when you -- in the -- when you talk about the principles of the election of remedies, I did make a grave error on my part. I was under the misconception that I had to follow, quote, the administrative procedures. I had to exhaust those. Later on, I found out through Bacher (ph) versus Sipes (ph) which I'll cite to the court, which specifically tells of the difference between an unfair labor practice and a breach of contract and how the individual is not obligated to pursue that administrative remedy, that he has access to the courts immediately if he chose -- (indiscernible) come up that place here. Bacher (ph) versus Sipes (ph), that's 87 S.Ct. at page 903 and that's a 1967 case. It was also brought out in the Machinist's Union versus Gonzales, that's 78 S.Ct. at page 923, that's a 1958 case. They all -- that's what happened, and the fact that the board made the void decision, like I said, and the voidness is -- if you'll look at the memorandum on void decisions that I -- I have cited the authorities which state.....

THE COURT: I've read it and looked at it, Mr. DeNardo.

MR. DeNARDO: Okay. I wanted somebody to show me a case where -- any case where any court or administrative agency can make a decision contrary to all the facts and all the law and still come up with a valid decision that needs to be appealed. I find no case in all my research where that's the case. In fact I find everything totally the opposite. It's a denial of due

process. That's exactly what it is. Okay. Now, I want to address what -- I want to address this thing of the -- this decision by Mr. Hafling and the board. I put it -- it's probably my last argument on my memorandum to the court but what I would like to address the court's attention to the affidavits that were submitted by the state. One signed by Mr. Hafling and one signed by Mr. Reed. Now, to refresh the court's opinion (sic). At this hearing there was Mr. Hafling and Mr. Reed. Mr. Henry was not present at that hearing. When the decision was signed, we find the signatures of Mr. Hafling and Mr. Henry who was not there and absent from the decision -- the signature on the paper -- was Mr. Reed, who was, quote, in Mesa, Arizona. Now, I call the court's attention to the fact that in that affidavit they state that he was in Mesa, Arizona, they give no dates that he was there, they give no duration of time that he was there, so we don't know what the situation was, as to why he didn't sign it, why a copy wasn't sent to him. Because specifically in AS -- and it's entitled mail vote -- AS 44.62.600 specifically allows for a mail vote. Now, this wasn't done. They had every opportunity to have Mr. Reed, who was at the hearing, to vote by mail. He didn't do this. Now, this AS 44.62 -- administrative adjudication -- this was specifically adopted in the agency's regulations. Okay. I'll like to call the court's attention to something we've already talked about, AS 44.62.500(a)(2). A member of the agency who has not heard the evidence may not vote on a decision.

I've got a little quote, it's not that lengthy, but I think it's determinative of the fact -- and it's another indication of the lack of due process here, and what a railroad job that whole hearing was. And I'm going to quote from Morgan versus The United States, that 56 S.Ct. at page 906, and this case dealt with an administrative adjudication of Department of Agriculture under some enabling legislation of congress. And I'm going to quote. A proceeding of this sort requiring the taking and weighing of evidence, determinations of fact based upon the considerations of the evidence and the making of an order supported by such findings has a quality resembling that of a judicial proceeding. Hence, it is frequently described as a proceeding of a quasi-judicial character. The requirement of a full hearing has obvious reference to this tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts. The hearing is designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone and to reach his conclusion uninfluenced by extranenous considerations which in other fields might have play in determining purely executive action. The hearing is the hearing of evidence and argument. If the one who determines the facts which underlie the order has not considered evidence or argument -- and I submit to the court if you look at these affidavits that were submitted by the state and there's a quotation in there.....

THE COURT: Why don't you go ahead and finish that last quote you were reading, Mr. DeNardo.

MR. DeNARDO: Okay. Okay. There is thus no basis for the connection -- contention that the authority conferred by in this case section 310 of the Packers and Stockyards Act is given to the Department of Agriculture as department in the administrative sense so that one official may examine evidence and another official who has not considered the evidence may make the finding and order. In such a view, it would be possible, for example, for one official to hear the evidence and argument and arrive at certain conclusions of fact and another official who had not heard or considered evidence or argument to overrule these conclusions and, for reasons of policy, to announce entirely different ones. It is no answer to say that the question for the court is whether the evidence supports the findings and the findings support the order. For the weight ascribed by the law to the findings their conclusiveness when made within the sphere of the authority (indiscernible) rests upon the assumption that the officer who makes the findings has addressed himself to the evidence, and upon that evidence has conscientiously reached a conclusion that he deems it to justify. That duty cannot be performed by one who has not considered the evidence or argument. It is not an impersonal obligation. It is a duty akin to that of a judge. The one who decides must hear. In the affidavit the statement is made -- and I'm going to quote from the affidavit -- this is the affidavit of Mr. Morgan Reed. (Indiscernible). Okay. It's from Mr. Hafling's affidavit. It's on the bottom -- starting at the bottom of the

page, the last sentence. It says, I later discussed the case with Mr. Ron Henry, the third member of the Labor Relations Agency -- this is the member that was not present -- and since Mr. Reed was not available, I asked Mr. Henry to sign the order and decision as a matter of convenience. So here we have myself deprived of my property, my permanent status as an employee, we have Mr. Hafling sitting on the board -- now, the defendants have brought out the fact that this conflict of interest statement wasn't submitted till the nex -- the following year, 1979. Well, the dates are irrelevant here. Mr. Hafling was awarded that contract July 1st, 1978, for a million dollars. Now, I think it's worth looking at -- what I've seen in the paper recently regarding Your Honor disqualifying himself for a -- in the, quote, publicly known as the Bobby McGee arson case -- for something quite a bit less than that. Mr. Hafling had an obligation to inform me at that hearing of this contract and allow me to object as AS 42.62 requires. He did not do any of that. I have right here all the documents from the state department of administration showing that Mr. Hafling since 1974 has had ten -- hundreds of thousands of dollars worth of contracts with the state. I have here in the courtroom today all of the statements submitted by Mr. Hafling -- conflict of interest -- where he has perjured himself every year by denying he has had any contracts. Now, this envelope contract -- who knows how many other ones there are -- but he had an obligation to tell me about that at that hearing. So here

we have Mr. Hafling -- even if you don't disqualify -- disqualify him, you have Mr. Henry -- it's admitted in these affidavits that he never considered the evidence. He didn't even know what the argument was. Yet they put him in as a mere signatory for a matter of convenience in something as important to me as my property right.

THE COURT: Mr. DeNardo, you're going to have to wind up your argument. You've had more than your allotted time. I'm going to give you another two or three minutes to summarize it.

MR. DeNARDO: Okay. Well, that's about the extent of it. I have the documents to prove what I've said. And they -- like I said, they didn't -- I paid my dues. I have the receipts, they're all in the file that I've submitted to the court. They said I didn't.....

THE COURT: I'm assuming for purposes of your opposition here that that's all true. I'm assuming that.

MR. DeNARDO: Okay, then, the part that you keep sticking on is the fact is what a void decision? And I think it's worth re-reading my memorandum on void judgments.

THE COURT: I don't need to re-read them, Mr. DeNardo. I have read it and my staff has read it. We've done a work-up on it.

MR. DeNARDO: Okay. Well, then I guess that sums it up because I get the impression that you're really not going to buy my argument about the void decision, and that you -- somehow you keep thinking that I have to appeal it. You don't have to

appeal a void decision, it's a nullity and has no legal effect whatsoever. I thank the court.

THE COURT: Thank you, Mr. DeNardo. Mr. Murphy, did you want a rebuttal argument? What about the lack of -- one of the members having reviewed the evidence before signing the decision?

MR. MURPHY: Your Honor, I don't think that rendered the decision void. The decision -- the two members that heard the matter, according to their affidavits, decided the matter immediately after the hearing, instructed the consultant, Mr. Jim Lucas, who had been with the agency since inception in 1973, instructed him to write the opinion. He wrote it according to the instructions that were given to him. The vic -- the unsigned decision was then forwarded to both members who heard it, Mr. Hafling and Mr. Reed. Mr. Hafling signed it. Mr. Reed, who was in Mesa, Arizona, instructed the secretary that that was in accordance with what they had decided, and Ron Henry then signed the decision. I think it's -- it is in accordance with the Administrative Procedure Act.

THE COURT: Anything further?

MR. STEPHSON: Your Honor, I just want to say about that, that -- just to emphasize it, it's just a mere technicality. The way this decision was signed is totally immaterial. I mean it could have been done -- I don't know what bearing this has but I've drafted decisions for agencies and you can have it signed in any number of ways. I mean they could have had it State Labor Relations

by Steve Hafling, chairman. I mean there are any number of ways it could have been signed and the fact that Mr. Henry happened to sign it -- well, maybe he shouldn't have. I mean why did he sign it if he hadn't made the decision? But that has no bearing whatsoever on the validity of the decision. It's clear it was made by the two members who heard the evidence and the fact that one put his pen to paper and the other didn't is just totally immaterial.

THE COURT: Ms. Stephson, what it was signed by individuals that didn't hear the evidence at all? What if all the signatures were by persons who didn't hear the evidence -- didn't review it? Would you say that it's still a valid decision just because it seems to be based on some evidence?

MS. STEPHSON: Well, it depends on whether the people who had actually made the decision -- who had actually made the decision. And in this case it is clear that the two members who heard it -- Morgan Reed and Steve Hafling heard the case went up right after, sat down and decided it.

THE COURT: Is that a sufficient number to make a decision?

MS. STEPHSON: Yes. Two. There are three, and two is considered a quorum for adjudication. I don't remember the statute. It's in our brief and Mr. DeNardo cited it as well. So two is what is required. So these two members heard the decision, made -- heard the evidence, made the decision. It was then put in writing by their consultant. They both reviewed it. One wasn't

around so he didn't sign it. And that's all it is. I mean he didn't put his pen to paper and that is the extent of the error, if any. And somebody else put their pen to paper when they hadn't heard the decision.....

THE COURT: Oh, just a second now, Ms. Stephson. There were two people signed it, correct?

MS. STEPHSON: Yes.

THE COURT: And one of them wasn't even there?

MS. STEPHSON: Well -- yeah, but he is.....

THE COURT: Didn't even hear the evidence?

MS. STEPHSON: Right.

THE COURT: Now, is that the quorum you think the statute envisions?

MS. STEPHSON: No. No, the quorum was Steve Hafling and Morgan Reed. Morgan Reed did not sign it, but he decided it. He just didn't happen to be there to put his pen on the paper. But he decide it, he did read it -- read the written decision and verbally stated that, yes, he agreed with it. You know, had he been there he would have signed it. This provision in the APEA regarding mail vote -- well, maybe it would have been better for them to mail it to him, have him sign it and mail it back. I mean it would have looked better, there's no two ways about it.

THE COURT: Let's assume there was an irregulatity there, what effect would that have on Mr. DeNardo's complaint at this time? Would that be a subject for appeal or would that be a

subject for collateral attack alleging that the judgment is void -- the decision is void?

MS. STEPHSON: Well, what kind of error? And I think it -- a procedural error.....

THE COURT: Well, I'm asking you, would that -- if there was an error and it rose to the level that proper persons did not sign it, therefore, the decision was void because it was not signed by proper persons, wasn't signed by people who heard the evidence, if it rose to that level, would that be a subject of a collateral attack in this case or would that be the subject of an appeal from the administrative decision?

MS. STEPHSON: Okay. I think I'm not quite totally clear on what the assumption is. The assumption is that the people who signed it.....

THE COURT: Didn't hear the evidence, didn't.....

MS. STEPHSON: .....didn't hear the evidence.

THE COURT: That's right.

MS. STEPHSON: And who had actually made the decision?

THE COURT: Or there wasn't a proper quorum?

MS. STEPHSON: All right. Then not enough people had heard it and.....

THE COURT: That's correct.

MS. STEPHSON: .....and it was made by one member rather than two.

THE COURT: Yes.

MS. STEPHSON: Well, I'd say conceivably -- and, you know, I haven't researched that point -- conceivably that would fall within the notion that it was not a duly constituted court. You're supposed to have two people decide your case and only one decides it -- without having done any research on it, that might make the decision void. It's like having a magistrate decide your case when a judge should. But since that's not the case here at all....

THE COURT: Would you agree that if the decision is void that a collateral attack such as this is proper?

MS. STEPHSON: I think that is the rule. I think voidness though is a very narrow concept. I think one problem is that there's a lot of loose language around and in Mr. DeNardo's memo he cites a lot of sections from CJS and Am Jur. The word "void" is used a lot but when you're talking about collateral attack, voidness means something very precise. I mean a decision is void for purposes of collateral attack only in certain circumstances and those are the ones set forth in Pope v. Pollinton (ph). And usually it's when there's no subject matter jurisdiction or personal jurisdiction or no due -- no notice, opportunity to be heard, those sorts of real, fundamental things.

THE COURT: What if the decision was signed by two people who just walked in off the street, do you think I could consider that to be a void decision? Or would that not be.....

MS. STEPHSON: Well, who made.....

THE COURT: .....a void decision or would that not be specific enough?

MS. STEPHSON: Well, who had made the decision?

THE COURT: Well, how do you tell who has made the decision except by the written decision itself and the signatures on the bottom of the page, Ms. Stevenson (ph)?

MS. STEPHSON: Well, you find out the facts. I mean in this case we d d affidavits to establish who made the decision. I can't deny that it's -- it's a lit -- it's not the best way to have done it. There's no two ways about it. The members of the Labor Relations Agency are lay people and they often are not concerned with, you know, dotting every "i" crossing every "t". Well, not often, I take that back, I haven't really dealt with them, but in this case it didn't occur to them that this mattered, you know, who signed it. But they did do it right. I mean they knew that the two people who hear it decide it and in fact that is what happened. And all it is is a matter of who put pen to paper and who was in town and who wasn't. And as I said, if they had just put State Labor Relations Agency by a line and had the chairman sign it, that would have been fine. I mean there's no requirement that a decision lists everyone who made it if it's more than one person. You have a board of seven people. I don't think you can say it's required that each one sign it. It may be necessary at a later point to determine signed it but I don't think.....

THE COURT: You're saying I should look beyond the form of it and go to the substance of it?

MS. STEPHSON: Oh, absolutely.

THE COURT: In this case two members did actually make the

decision. The affidavits support that.

MS. STEPHSON: Oh, yeah.

THE COURT: It's a mere technicality that one of them didn't happen to sign it and by accident somebody else signed it, is that what you're saying?

MS. STEPHSON: Well, he wasn't there. He was in Arizona. They were up in Anchorage so they said, well, all right, Mr. Henry, why don't you review this and sign it. But he didn't make the decision and we are not purporting to say that Ron Henry made this decision, he didn't. Morgan Reed did and Steve Hafling did. And I can't even imagine that is an appeal point, let alone something that's going to render their decision void. I mean to render a decision void is a serious matter.

THE COURT: What is you say is that may not be.....

MS. STEPHSON: I don't think it's even error.

THE COURT: .....the subject of a meritorious appeal, it would be.....

MS. STEPHSON I don't think it's even error and it's certainly -- if it's error, it's certainly not the kind that's going to render a decision void.

THE COURT: Well, if it were error, would this court not have the power to relieve Mr. DeNardo of the seemingly harsh requirements of timely appeal for good cause shown if he could show that there was not -- he did not have the information at the time and he used diligence in trying to obtain it?

MS. STEPHSON: Which information?

THE COURT: The information concerning the person who signed it not having reviewed the evidence.

MS. STEPHSON: Well, when he got the decision and he could have looked at it right then and said, hey, Ron Henry wasn't there. Why did he sign this decision? I mean at that point it was an issue for appeal if he thought there was something really egregious about that. It was apparent from the start. I mean from the start of the thirty day period.

THE COURT: Very well. Mr. DeNardo, I want to ask you a couple questions. What about the attorney general's argument that this was something that could have been appealed? It wasn't something hidden from you. There's no showing of excusable neglect here in your brief that you didn't know or that you were unaware of this information. It seemed to be patently obvious when you read the decision.

MR. DeNARDO: Well, it wasn't patently obvious 'cause I'm not an attorney and I'm -- I'm working overtime trying to start from scratch and find out what the law is let alone the technicalities of the way the decision has to be rendered. In Jager versus State it says right here the indication of whether an agency has proceeded in the manner required by law is compliance with its own regulations. The regulations specifically set out the decision -- there will be a record, things will be in writing.....

THE COURT: I don't argue that, Mr. DeNardo, I'm saying

that that would be a proper subject for appeal for appeal. It may not be meritorious, depending on what the decision was, but it would be something you could bring up on appeal and I find the lack of any showing of excusable neglect for your failure to make a time appeal throughout this brief. Now, your assertion that you're not a lawyer doesn't get it done, Mr. DeNardo.

MR. DeNARDO: Well, I tell you what does get it done is the fact is just take a look at all the decisions previously rendered by the labor board. I've had an opportunity to peruse a number of them. They always have the signatures on the last page. That's what's required by the regulation, AS 44.62 -- 44.62, that it will be in writing, that there will be a quorum. This is in the regulations that the board has adopted and right here it said -- it states that this.....

THE COURT: I don't deny that. I'm assuming for purposes of argument.....

MR. DeNARDO: But you didn't have a quorum. You didn't have a quorum rendering this decision. Mr. Henry -- here's the U.S. supreme court case. That man had no business signing that thing whatsoever. Since when does Mr. Henry get to sign for a person, Mr. Reed?

THE COURT: The attorney general though argues that that's merely an irregularity as to form and not to substance and that there was a quorum that made the decision.

MR. DeNARDO: There was -- where -- where's the proof that

quorum made the decision? The affidavit which is mere hearsay. I realize it's admissible in a hearing on a motion but it has to be in the record. It has to be in the record. That's why they make a provision for a mail vote. He could very easily -- there's no -- why didn't they stick to this? It's their regulation. They didn't have a mail vote. They had -- for a matter of convenience.....

THE COURT: Do you dispute that the two members, one who did not sign but was there, were in fact there and did participate in the decision? Is there a dispute as to that? I don't find any dispute on the record as to that. I don't find any dispute.....

MR. DeNARDO: I go to the face -- the decision -- the decision was not rendered by the required quorum and Mr. Hafling should have been removed.

THE COURT: Okay, then you're asserting on the basis of the decision that there wasn't a quorum, just on the basis of the written decision and the signatures thereon?

MR. DeNARDO: It's more than just the signatures, Your Honor.

THE COURT: Well, there's been an affidavit filed by a member saying he participated and that was his decision.

MR. DeNARDO: Well, where is the proof of his decision? It is not in the record. It must be in the record by AS 44.62 in the board's own regulations. It is not in the record. He could have gotten it in the record. They could have mailed him a copy and he could have signed it or he could have had a mail vote. It is

not in the record at all.

THE COURT: Do you dispute that he was present and participated?

MR. DeNARDO: He was present but he didn't decide. He had no part in the decision.

THE COURT: Well, his affidavit says that he did.

MR. DeNARDO: Well, the facts and the record and the law says he didn't. And he has to fulfill that and that's what Jager versus State says, you have to look did they follow their own regulations, and, no, they didn't. And how long have they been in this business? Those three people have probably sat on -- well, one of them says he's been on it since 1971. Yet after all this time they still don't know how to render a decision? I submit to you that that decision wasn't based on law or fact, thereby making it void. The subsidiary issue was the fact that was only rendered by one person and that person should have been disqualifed for hiding a conflict of interest. He broke -- there's so many errors in this thing that it's unbelievable. It really is unbelievable and that's why this thing was a railroad job from the beginning.

THE COURT: Do you have anything further, Mr. DeNardo?

MR. DeNARDO: No, I don't. Thank you, Your Honor.

THE COURT: For purpose of making a decision on this motion I'm going to treat it as a Rule 56 motion for summary judgment since there have been documents presented outside the pleadings. And I find on the basis of the documents filed and assuming certain

facts by Mr. DeNardo to be undisputed, I find that there are no disputed material issues of fact and that judgment should be entered accordingly on behalf of the defendants in this case. Anything further?

MS. STEPHSON: No.

MR. DeNARDO: Just for the record I'm going to appeal it to the supreme court.

THE COURT: Very well, Mr. DeNardo. I wish you luck, sir. Stand in recess.

THE CLERK: Please rise. This court stands in recess.

(Court recessed)

3257

****
END OF REQUESTED PORTION
****

C E R T I F I C A T E

SUPERIOR COURT)
) ss.
STATE OF ALASKA)

I, La Verne Dunder, court reporter for the third judicial district, state of Alaska, hereby certify:

That the foregoing pages numbered 1 through 32 contain a full, true and correct transcript of proceedings in cause No. 3AN 80-2396 Civ., Daniel R. DeNardo versus Patrick Murphy et al., third district, transcribed by me to the best of my knowledge ability from third judicial district Akai tape identified as follows:

Tape No. B-1332 Log Nos. 2947 - 3257

DATED at Anchorage, Alaska, this 11th day of December, 1980.

SIGNED AND CERTIFIED TO BY:

La Verne Dunder
Court Reporter

Motion to Dismiss or Affirm

Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

No. 81-5566

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

DANIEL R. DENARDO,
Appellant,

VS.

PATRICK E. MURPHY, ALASKA PUBLIC EMPLOYEES ASSOCIATION, and THE STATE OF ALASKA,
Appellees.

On Appeal from the Supreme Court of the State of Alaska

MOTION TO DISMISS OR AFFIRM

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No. 81-5566

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

DANIEL R. DENARDO,
Appellant,

vs.

PATRICK E. MURPHY, ALASKA PUBLIC EMPLOYEES ASSOCIATION, and THE STATE OF ALASKA,
Appellees.

On Appeal from the Supreme Court of the State of Alaska

MOTION TO DISMISS OR AFFIRM

STATEMENT OF THE CASE

The Alaska Public Employees Association (APEA) is the collective bargaining agent for many of the employees of the state of Alaska. At all times relevant to this matter the negotiated agreements between APEA and the state have contained an agency shop provision requiring as a condition of employment that all bargaining unit members pay dues or fees to APEA for collective bargaining purposes.

The Appellant, Mr. DeNardo, was employed by the state but failed to meet his financial obligation to APEA. He was therefore terminated from employment at APEA's request, effective April 21, 1978.

All of Mr. DeNardo's attempts to challenge this action have been rejected on substantive state grounds or dis-

missed for his failure to comply with state procedural requirements.

Mr. DeNardo filed an unfair labor practice charge with the Alaska Labor Relations Agency, the state's counterpart to the National Labor Relations Board for public employees. He alleged that he had paid all that he should have and that the discharge was improper. The agency ruled against Mr. DeNardo, finding that his termination was justified under state law.

Fifteen months later Mr. DeNardo filed a separate action in the superior court for Alaska, alleging that the defendants had "unlawfully converted [his job] to their own use and benefit." Mr. DeNardo asked for damages of more than one million dollars.

The state, APEA, and APEA's executive director were the named defendants. All moved for summary judgment on the grounds that this independent action was an impermissible attempt under state law to relitigate matters already determined by the agency. Defendants contended that Mr. DeNardo should have appealed the decision of the agency in a timely fashion if he was dissatisfied with its conclusions.

Mr. DeNardo claimed the agency's decision was void and of no effect as contrary to the evidence that was presented.

The superior court dismissed the complaint without opinion on October 8, 1980. Mr. DeNardo appealed that ruling to the Alaska supreme court, claiming he had been denied due process and trial by jury among other things. The supreme court affirmed the decision without opinion.

ARGUMENT

1. This Case Is More Appropriately Considered As A Petition For Writ of Certiorari

Appellant contends in this Court that he has been denied his right to due process, equal protection, and trial by jury. Jurisdictional Statement of Appellant, p. "i". He asks the Court to review the decision below under 28 U.S.C. § 1257(2), which provides:

> Final judgments or decrees of the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> ...
>
> (2) By appeal, where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.
>
> ...

Because he questions no state statute in his issues presented to the Court, Appellant's claim does not fall within the scope of this provision. *Richmond Newspapers, Inc. v. Virginia*, 440 U.S. 555, 562 n.4 (1980); *Hanson v. Denckla*, 375 U.S. 235, 244 n.4 (1958).

The state agency that made the initial decision derives its authority from a legislative delegation of authority AS 23.40.070 et seq. It may be contended by Appellant that because of this the agency decision should be considered a state statute and the proper subject of an appeal.

However, this rule applies only if the agency action was "legislative" in character. *Lathrop v. Donohue*, 367 U.S.

820, 824-5 (1961). This case involves an agency decision of a "judicial" nature. The past conduct of a single individual was reviewed. The decision affected the rights of only the parties before the agency. No rule of general and prospective application was adopted—the hallmarks of legislative action.

Even though the appeal is not proper, the inquiry does not end. Congress has insured that a wrong choice between the two avenues for seeking review will not foreclose consideration under the other. 28 U.S.C. § 2103 provides that an appeal that fails to meet the requirements of 28 U.S.C. § 1257(2) "shall be regarded and acted on as a petition for writ of certiorari . . ." However, the standards for granting review differ, and this case should be subject to those applicable to petitions for writs of certiorari. Compare Supreme Court Rules 16 and 17.

2. Appellant Does Not Raise Important Questions of Federal Law

Should the court find that the appeal is improvidently taken and a petition for writ of certiorari is more appropriate, it should be reviewed for sufficiency under the standards of Supreme Court Rule 17.

Appellant raised two issues—was the agency decision an abuse of power that violated due process, and was he denied a constitutional right of jury trial?

There has been no prior judicial interpretation in the court below of the due process clause of the Fourteenth Amendment to the U.S. Constitution and its application to the facts of this case, so there is as yet nothing for the

Court to review. The disposition of Appellant's claim on a procedural ground made consideration of this assertion unnecessary.

Even if this obstacle was not present, there is no lack of decisions setting forth the standards to be followed in such circumstances. See, e.g., *Kessler v. Strecker*, 307 U.S. 22, 34 (1939); *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 51 (1936); *Crowell v. Benson*, 285 U.S. 22, 46 (1932); *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922). Thus, agency action meets with due process if it acts "upon evidence and is not arbitrary" having "evidence to support the findings". *St. Joseph Stock Yards Co.*, supra p. 51.

Appellant's first issue does not, therefore, raise important questions of federal law.

The second issue needs little exposition. The Seventh Amendment's guarantee of trial by jury is not applicable to the states, see e.g., *Hardware Dealers Mutual Fire Insurance Co. v. Glidden Co.*, 284 U.S. 151, 158 (1931). Appellant raises no federal question here. His right to jury trial depends solely on the state court's interpretation of its own constitutional provision and is not a proper subject for review.

Supreme Court Rule 17(c) suggests that only important questions of federal law will be reviewed. Because the law is so clear in the areas of dispute the Court should decline to exercise its discretionary jurisdiction and dismiss the appeal or deny the petition for writ of certiorari as may be appropriate.

3. No Federal Question Was Urged Below

> The jurisdiction of this court to re-examine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right.
>
> *Oxley State Co. v. Butler County,* 166 U.S. 648, 655 (1897).

When Appellant filed his complaint in the superior court he did not so much as mention the decision of the labor relations agency, Appendix A. No error on the part of the agency was urged, no violation of constitutional rights was alleged. Appellant sought a trial de novo on the facts previously considered by the agency in a different forum.

When he learned that res judicata and collateral estoppel principles were a bar to his action in court, Appellant then sought ways to defeat the action of the agency. In his defense to defendants' summary judgment motions, Appellant alleged the agency's decision was void. See Jurisdictional Statement of Appellant, Appendix H. Appellant continued his attack on the agency decision in the state supreme court, alleging that he had suffered a "denial of due process" and a right "to a jury trial at law to defend a constitutional property right." Appendix B.

Alaska's constitution guarantees due process and the right to a jury trial. Alaska constitution Article I, §§ 7 and 16, respectively. Appellant's Points on Appeal do not specify which constitution he is relying on. Appendix B.

He may have been asserting rights guaranteed only by the state constitution, the interpretation of which is the

duty of the state courts. Review of Appellant's brief for the state supreme court suggests this is what he intended. The only citations made in support of his constitutional claims are to the state constitution. Appendix C.

A bare reference to "due process," without making it clear that the federal, as opposed to the state, guarantee is being asserted should not be assumed to mean the former. Claims of this sort are treated as meaning, only the state constitution. *Brady v. Maryland*, 373 U.S. 83 (1963), separate opinion p. 91; *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67-8 (1928). This rule is based on the notion that the state court may have resolved the question on state grounds not reviewable here. *Reding v. Texaco, Inc.*, 598 F.2d 513, 519 (9th Cir. 1979). This is especially likely when the court provides no opinion setting forth the basis for its ruling, as here. See the decision below, Appendix D. Even if the record were ambiguous, the Court should refuse to consider the appeal because of the likelihood that the state constitution lay behind the decision. See *Simmons v. West Haven Housing Authority*, 399 U.S. 510 (1970).

The Appellant has the burden of showing that a Federal issue was adequately presented below. Supreme Court Rule 15 (1)(d). All that he presents here is the bald assertion that "[t]he substantial federal questions . . . were properly before the courts of Alaska." Jurisdictional Statement of Appellant p. 3.

> The rule that in cases coming from state courts this Court may review only those issues presented to the state court is not discretionary but jurisdictional.

Justice Harlan, dissenting in *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308, 334 (1968).

Having failed to properly raise a federal question in the state courts, Appellant cannot do so now. *Tacon v. Arizona*, 410 U.S. 351, 352 (1973); *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969).

Appellant appears in his own behalf and has sought leave to proceed in forma pauperis. While there have been instances where the court has been lenient in its demand that a federal right have been asserted below, these cases involved petitions raising fundamental rights of liberty filed by prisoners without the aid of counsel. See, e.g. *Durley v. Mayo*, 351 U.S. 277, 282 n.3 (1956).

Such compelling equities are not present in this case. Further, Appellant has demonstrated the ability to perform legal research, draft pleadings and present his contentions in an orderly fashion. It is not unreasonable to expect him to have asserted federal rights in the courts below had he been claiming them.

4. The Judgment Below Rests On An Adequate Non-Federal Basis

Appellees were successful in having Appellant's complaint dismissed on their contention that no timely appeal of the agency decision was taken. As a result, Appellant was bound by the findings made there and collaterally estopped from raising the same questions in another proceeding. This holding is based on state procedural law and provides adequate state grounds for the decision below.

Alaska follows the Restatement of the Law, Judgments (1942) in deciding what adjudications may safely be ignored. *Holt v. Powell*, 420 P.2d 468, 471 (1966). Ap-

pellant urges an evidentiary error of the agency as justification for his failure to appeal, but this does not appear in the Restatement as grounds for making the decision void. Restatement, supra, §§ 4-10. Even if the agency erred it may not be said that its decision is an "absolute nullity." See *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 376 (1940).

Only in the rarest of cases does a challenge to jurisdiction succeed. One hearing on the merits is all a party is generally entitled to. This avoids a multiplicity of suits and prevents harassment and vexing litigation. Judicial resources already stretched too thin cannot absorb the luxury of permitting challenges to earlier decisions at the whim of a dissatisfied party. This would be unfair to the other parties, who have a right to expect that a matter is concluded at some reasonable time.

Appellant invoked the jurisdiction of the agency by filing his accusation, and then participated in the fact-finding process. He was unsuccessful, and could have appealed the decision under Alaska Rule of Appellate Procedure 45[1] but he chose not to. At this point all of the policies discussed above become applicable. The state's interest in denying Appellant a second try at this late date is adequate to justify the dismissal of his complaint. This is the appropriate result under state law. *Winegardner v. Greater Anchorage Area Borough*, 534 P.2d 541, 545 (Alaska 1975).

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[1]The Appellate Rules of Alaska have been rewritten and reissued since this case was decided. See Appellate Rule 602 for the current provision.

Appellant cites authority to the effect that agency determinations are void if lacking evidentiary support. *Estep v. United States*, 327 U.S. 114 (1946); *Chicago, Rock Island Railroad v. United States*, 274 U.S. 29 (1927); *ICC v. Louisville and Nashville Railroad*, 227 U.S. 88 (1912); *K&L Distributors v. Murkowski*, 486 P.2d 351 (Alaska 1971). Jurisdictional Statement of Appellant pp. 22-23.

In these cases the question before the courts was whether they could review agency findings when a statute apparently barred it. In each instance the court found that it could review the decision to see if it met the demands of due process.

Appellees do not contend for a contrary result. However, this is not the question raised here. There is no statute or rule denying Appellant the right to have the agency's findings scrutinized by a court. Cf. *Oestereich v. Selective Service System*, 393 U.S. 233, 237-8 (1968). The issue is not whether Appellant may have had the decision reviewed, but how he was to obtain it.

A state is "free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). See also *Boddie v. Connecticut*, 401 U.S. 371, 375-6 (1971); *Caesar v. Mountanos*, 542 F.2d 1064, 1068 (9th Cir. 1976).

Indeed, it is well established that appeals need not be allowed if there is full and fair consideration of the

merits. *Lindsey v. Normet*, 405 U.S. 56 (1972). If appeals are allowed, requiring that they be made quickly does not offend due process. *Lichter v. United States*, 334 U.S. 742 (1948); *Yakus v. United States*, 321 U.S. 414 (1944), cited in *Clarkson Construction Co. v. OSHA*, 531 F.2d 451 (10th Cir. 1976). Finally, if the action was dismissed for a failure to conform to rules or practice, this Court is without jurisdiction. *Hammerstein v. Superior Court*, 341 U.S. 491, 492 (1951).

Alaska's rules for the handling of appeals are sufficient to meet any federal constitutional objection.

Even if Appellees concede that the agency decision had been so contrary to the evidence as to violate due process, it does not follow as a matter of course that Appellant had the right to challenge it at his leisure. This is not a case where the agency was acting in an area beyond that which it had authority, see *Standard Oil Co. v. Monte Catini Edison S.p.A.*, 342 F.Supp. 125, 129-30 (D.Del. 1972), nor where personal jurisdiction is lacking, see *Johnson v. Laird*, 432 F.2d 77, 79 (9th Cir. 1970). All jurisdictional prerequisites were met and a full review of the facts was provided. In such instances it is not unreasonable to expect a dissatisfied litigant to raise allegations of error in a timely appeal. In any event such a rule is within the broad latitude states have in devising their own procedures under *Snyder* and *Boddie*, supra.

A contrary holding would make every judgment open to challenge at any time, so long as the objection was based on a lack of evidence. This is contrary to the compelling need for certainty and repose.

In such circumstances it does not seem unreasonable or arbitrary for the state to require that questions of evidentiary sufficiency, even if alleged to be so serious as to amount to a denial of due process, be asserted within the time allowed for appeal. To allow the contrary would encourage litigants, unhappy with a court's resolution of a dispute they fully participated in, to avoid the time for appeal by alleging the judgment erred on constitutional grounds. This is not conducive to the effectuation of the rational policies outlined above. The state should be allowed the opportunity to strike the balance where they deem it appropriate.

Further encroachment on the rule of finality should be resisted, particularly where there are available other "effective alternatives for the adjustment of differences." *Boddie*, supra at p. 376. Appellant could have appealed but did not. Due process does not require that he be allowed to change his mind fifteen months later.

Appellees contend that the action below was based on fair and equitable procedures adopted by the state in furtherance of a substantial public purpose.

CONCLUSION

This appeal should be considered as a petition for writ of certiorari and review denied. The decision below rests on independent and adequate state grounds. Further, Appellant did not assert a Federal Right below, and even if this were not so, no important question of Federal Law is presented. Alternatively, the appeal should be dismissed or the decision of the Alaska supreme court should be affirmed.

Dated this 25th day of November, 1981.

Respectfully submitted,

WILLIAM B. ROZELL
Counsel of Record

JOHN E. CASPERSON
Attorneys for Appellees
Patrick E. Murphy and
Alaska Public Employees
Association

(Appendices follow)

Appendix A

In the Superior Court for the State of Alaska
Third Judicial District

Daniel R. DeNardo
Plaintiff, pro se,

vs.

Patrick Murphy, Director, A. P. E. A.;
Alaska Public Employees' Association;
State of Alaska,
Defendants.

COMPLAINT AND DEMAND FOR JURY TRIAL

THE UNDERSIGNED, DANIEL R. DeNARDO, Plaintiff in the action, is a merchant and/or trader at law on the cash basis only, and appears pro se. Plaintiff complains against the Defendants above named for conversion of Plaintiff's property rights.

I

DEFENDANT PATRICK MURPHY is executive director of Alaska Public Employee's Association. Mr. Murphy was executive director of Alaska Public Employee's Association at the time of the wrong complained of.

II

DEFENDANT ALASKA PUBLIC EMPLOYEE'S ASSOCIATION is a labor organization under Alaska Statute 23.40.

III

DANIEL R. DeNARDO, Plaintiff, pro se, complains of Mr. Patrick Murphy, Alaska Public Employees' Association, and the State of Alaska, defendants, who have been summoned to answer the said Plaintiff in his action at law.

IV

ON APRIL 21, 1978, PLAINTIFF was a permanent employee of the State of Alaska in Anchorage, under Alaska Statute 23.40, Article 2.

V

PLANTIFF WAS THE owner and had right of possession at law to the personalty described in paragraph IV above.

VI

ON APRIL 21, 1978, DEFENDANTS, with knowledge that said personalty was owned by the Plaintiff, took and unlawfully converted it to their own use and benefit.

VII

ON FINDING OUT THAT Defendants had unlawfully converted Plaintiff's said personalty, Plaintiff demanded that Defendants return it or reimburse Plaintiff for the value thereof. However, Defendants refused to return the personalty or to reimburse him for the value thereof, and have continually refused to do so up to the time of filing of this suit.

VIII

THE TAKING AND CONVERSION of the personalty by Defendants was done intentionally, willfully, and maliciously in bad faith, with a reckless disregard for Plaintiff's rights. After demand was made on Defendants to return said personalty or reimburse said Plaintiff for the value thereof, Defendants intentionally, in bad faith, willfully and maliciously refused to return the personalty, or reimburse Plaintiff therefor.

FOR SUCH INTENTIONAL, willful, and malicious act in bad faith on the part of the Defendants, Plaintiff hereby seeks by his action, judgment against Defendants jointly and severally for a sum in excess of one million dollars, in compensatory and punitive damages, plus costs and fees, and therefor he brings this suit.

Dated: April 10, 1980.

Daniel R. DeNardo
P. O. Box 682
Anchorage, Alaska 99501

/s/ Daniel R. DeNardo

Daniel R. DeNardo

Appendix B

In the Supreme Court for the State of Alaska

Daniel R. De Nardo,
Appellant, Pro se,

vs.

Patrick Murphy, Director, APEA,
Alaska Public Employees Assn.,
State of Alaska,
Appellees.

Case No. 3AN 80-2396; Supreme Court No. 5631

Restatement of Points on Appeal

1. The State Labor Relations Agency's decision is void as a matter of fact.

2. A void decision is lack of jurisdiction and denial of due process of law.

3. A permanent State of Alaska employee has a constitutionally protected property right.

4. Appellant is entitled to a jury trial at law to defend a constitutional property right.

5. A void judgment can be attacked collaterally.

6. Appellant is entitled to summary judgment as a matter of law upon undisputed documentary facts.

Dated at Anchorage, Alaska this 15th day of January, 1981.

/s/ Daniel R. DeNardo
By: Daniel R. DeNardo
Merchant and Trader
At Law

Appendix C

In the Supreme Court of the State of Alaska

Daniel R. De Nardo,
Appellant, In Propria Persona,

v

Patrick Murphy, Director, APEA,
Alaska Public Employees Assn.,
State of Alaska,
Appellees.

Supreme Court File No. 5631

Appeal from the Superior Court,
State of Alaska, Third Judicial District
Judge Karl Johnstone

Appellant Brief

Daniel DeNardo
Box 682
Anchorage, Alaska 99510
(In Forma Pauperis)

Filed in the Supreme Court of
the State of Alaska this 26th
day of January, 1981.
Robert D. Bacon, Clerk of the Supreme Court

By /s/ S. B. Andrews

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STATEMENT OF JURISDICTION

Daniel DeNardo appeals under Appellate Rule 204(a) and AS 22.05.010(a) from the 8 October, 1980 Judgment and Order granting summary judgment (R. 199). Notice of Appeal was filed 10 November, 1980 (R. 200).

CONSTITUTIONAL PROVISIONS—STATUTES—RULES

Article I.

Declaration of Rights

Section 7. Due Process. No person shall be deprived of life, liberty, or property, without due process of law. The right of all persons to fair and just treatment in the course of legislative and executive investigations shall not be infringed.

Section 16. Civil Suits; Trial by Jury. In civil cases where the amount in controversy exceeds two hundred fifty dollars, the right of trial by a jury of twelve is preserved to the same extent as it existed at common law. The legislature may make provision for a verdict by not less than three-fourths of the jury and, in courts not of record, may provide for a jury of not less than six or more than twelve.

Sec. 09.25.080. Right to receipt upon payment or delivery. A person who pays money or delivers an instrument or property is entitled to a receipt for it from the person to whom the payment or delivery is made, and may demand a proper signature to the receipt as a condition of the payment or delivery. (§ 3.19 ch 101 SLA 1962)

Sec. 09.25.090. Objections to tender. The person to whom a tender is made shall at the time specify any objection he may have to the money, instrument, or property, or he waives it. If the objection is to the amount of money, the terms of the instrument, or the amount or kind of property, he shall specify the amount, terms, or kind which he requires, or is precluded from objecting later. This section shall not be construed to modify or change in any manner corresponding provisions of the Uniform Commercial Code (AS 45.05). (§ 3.20 ch 101 SLA 1962)

2 AAC 10.440. ORDERS. (a) At the conclusion of a hearing, the labor relations agency will prepare a written order based upon the decision rendered.

(b) Relevant decisions of the National Labor Relations Board and federal courts will be given great weight in determinations made under this chapter and AS 23.40. (Eff. 6/2/78. Reg. 66)

Authority:

AS 23.40.100, AS 23.40.110, AS 23.40.140, AS 23.40.170.

Sec. 23.40.110. Unfair labor practices. (a) A public employer or his agent may not

(1) interfere, restrain or coerce an employee in the exercise of his rights guaranteed in § 80 of this chapter;

(2) dominate or interfere with the formation, existence or administration of an organization;

(3) discriminate in regard to hire or tenure of employment or a term or condition of employment to encourage or discourage membership in an organization;

(4) discharge or discriminate against an employee because he has signed or filed an affidavit, petition or complaint or given testimony under §§ 70—260 of this chapter;

(5) refuse to bargain collectively in good faith with an organization which is the exclusive representative of employees in an appropriate unit, including but not limited to the discussing of grievances with the exclusive representative.

(b) Nothing in this chapter prohibits a public employer from making an agreement with an organization to require as a condition of employment

(1) membership in the organization which represents the unit on or after the 30th day following the beginning of employment or on the effective date of the agreement, whichever is later; or

(2) payment by the employee to the exclusive bargaining agent of a service fee to reimburse the exclusive bargaining agent for the expense of representing the members of the bargaining unit.

(c) A labor or employee organization or its agents may not

(1) restrain or coerce

(A) an employee in the exercise of the rights guaranteed in § 80 of this chapter, or

(B) a public employer in the selection of his representative for the purposes of collective bargaining or the adjustment of grievances;

(2) refuse to bargain collectively in good faith with a public employer, if it has been designated in accordance with the provisions of §§ 70—260 of this chapter as the exclusive representative of employees in an appropriate unit. (§ 2 ch 113 SLA 1972)

Rule 520. General Authority of Appellate Courts.

(c) The appellate court may affirm, modify, vacate, set aside or reverse any judgment, decree, decision or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree or order; or require such further proceedings to be had as may be just under the circumstances.

STATEMENT OF THE ISSUES

Does a void administrative decision depriving an individual of his property; preclude due process by jury trial in an action at law?

STATEMENT OF THE CASE

Statement of Facts:

Daniel DeNardo was a permanent employee with the State of Alaska (R. 2, 5, 7) when he was terminated on 21 April, 1978 by the State of Alaska (R. 60, fact no. 18) (R. 99) pursuant to a written demand from Alaska Public Employees Association (APEA). APEA alleged that Mr. DeNardo failed to pay his obligatory agency fees under article 9 of the 1977-1979 Collective Labor Agreement (R. 60, fact no. 17) (R. 95, 96, 97, 98) (TR. 3, L17-19). APEA had given Mr. DeNardo hand written receipts in conformity with AS 9.25.080, Right to Receipt Upon Payment of Delivery, and AS 9.25.090, Objection to Tender; when Mr.

DeNardo had originally paid those same agency fees which APEA was now demanding be paid a second time (R. 59, fact no. 9) (R. 60, facts nos. 15, 16, 19) (R. 84, 93, 94, 100) (TR. 14, L5-7) (TR. 20, L11-13).

Mr. DeNardo filed an unfair labor practice complaint under AS 23.40.110 with the State Labor Relations Agency (Agency) on 6 July, 1978 (R. 144-145), and an Agency hearing was held 10 October, 1978 (R. 104, L9-10) (TR. 3, L22). Ruling contrary to the irrefutable documentary evidence (R. 84, 95, 96, 93, 94, 100), the Agency issued its void decision 8 January, 1979 (R. 102-112) denying Mr. DeNardo's complaint. The decision was based on the erroneous assumption of law that the Agency could arbitrarily interpret the agency shop provision AS 23.40.110(5)(b)(2) as justifying APEA's demands for the double payment of agency fees (R. 85, 86, accounting entries) (R. 58, 60, 65) (TR. 103, L18-24). The Agency stated there was no agency shop provision in the Taft-Hartley Act and therefore there were no National Labor Relations Board decisions or federal cases to rely on (R. 110).

The Agency's regulation 2AAC 10.440(b) required, "Relevant decisions of the NLRB and federal courts will be given great weight in determinations made under this chapter and AS 23.40 (R. 61)." In fact, the Taft-Hartley Act provides for an agency shop in sec. 8(a)(3), whereby "Membership as a condition of employment is whittled down to its financial core." *NLRB v. General Motors*, 373 US 734 (1963) (R.67).

On 10 April, 1980 Mr. DeNardo filed an action at law with a request for jury trial (R. 1-4) (TR. 3, L12). The defendants filed a motion to dismiss 7 July, 1980 (R. 22, 39) on the grounds of res judicata and failure to file a timely appeal (TR. 4, L9-12). A summary judgment hearing was held 21 August, 1980.

Mr. DeNardo collaterally attacked (R. 53) (TR. 13, L24-25-TR. 14, L1-2) the State Labor Relations Agency's Decision No. 39 (R. 102-112) as being void for lack of jurisdiction to render a decision contrary to all the evidence and all the substantive law (R. 51-132) (TR. 5, L11-26) (TR. 11, L1-25). The void decision as fact was argued on the basis of a verified complaint (R. 1-4), two verified memoranda of law and facts (R. 51-74), and eighty-nine admissible and undisputed evidentiary documents. Fifty-eight of the documents were submitted by Mr. DeNardo (R. 75-132), twenty-nine by APEA and Mr. Murphy (R. 149-177), and two by the State of Alaska (R. 185, 186, 210, 211). Additionally, Mr. DeNardo adopted all of the cases cited by defendants as being on point to his argument (TR. 9, L16-17).

For purposes of the Civil Rule 56 Motion for Summary Judgment, the court assumed all the pleaded and undisputed documentary facts in favor of the non-movant Mr. DeNardo (TR. 11, L1-10) (TR. 14, L15-17) (TR. 20, L10-16) (TR. 28, L17-25) (TR. 31, 32). Defendants were granted summary judgment as a matter of law (TR. 32) because there was a lack of showing by Mr. DeNardo of excusable neglect (TR. 29, L3-4) to make a timely administrative appeal of the Agency's void decision (TR. 11, L8-10)

(TR. 14, L25-TR. 15, L1-2) (TR. 23, L23-25-TR. 24, L1-2) (TR. 28, L25-TR. 29, L1-5).

Course of the Proceedings:

Mr. DeNardo filed an unfair labor practice complaint with the State Labor Relations Agency (Agency) on 7 July, 1978 following his termination from permanent State employment on 21 April, 1978. A hearing was held 10 October, 1978 and the Agency issued a void decision 8 January, 1979.

An action at law with a request for a jury trial was filed 10 April, 1980. A motion to dismiss was filed by defendants 7 July, 1980 and a hearing held 21 August, 1980, the Honorable Karl S. Johnstone presiding. Summary judgment was granted defendants as a matter of law upon undisputed facts (TR. 31, 32). The Judgment and Order was signed 8 October, 1980 (R. 199).

ARGUMENT

Summary of Argument:

"But the statute gave the right to a full hearing, and that conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with the facts proved. A finding without evidence is arbitrary and baseless. And if the government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our government. It would mean that, where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority however

beneficently exercised in one case, could be injuriously exerted in another, is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power.

In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, quasi-judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to the "indisputable character of the evidence." Interstate Commerce Commission v Louisville & Nashville Railroad Co., 227 US 88, 91 (1913)

Mr. DeNardo was deprived of his constitutional property interest by a void administrative decision. The Agency's void decision was contrary to the indisputable documentary evidence that showed Mr. DeNardo had paid his agency fees in full in accordance with AS 9.25.080 and 9.25.090. Mr. DeNardo properly collaterally attacked the Agency's decision in an action at law and is entitled to partial summary judgment on the defendants' liability with damages to be determined at trial by jury.

ARGUMENT

Void Decision:

"This court has held that an order of the Interstate Commerce Commission is void unless supported by findings of the basic or quasi-jurisdictional facts conditioning its power. . . . "Orderly review requires that this objection being basic and jurisdictional, be disposed of at the beginning." U.S. v Chicago, Milwaukee R.R., 294 US 499,

504, 505 (1935) The uncontroverted fact of the State Labor Relations Agency's decision being void was based on incontestible documentary evidence that was viewed in a light most favorable to the non-movant Mr. DeNardo. Jennings v State, 566 P2d 1304, 1310, 1311(1977 Alaska) (TR.11,L1-10) (TR.14,L15-17) (TR.20,L10-16) (TR.28, L17-25) (TR.31,32) (R.51-132) On appeal, the Agency's void decision is taken as fact by operation of law. "The bill charges, in clear and definite terms, that this finding was wholly unsupported by the evidence. We must take that fact as admitted for the purpose of this appeal. The allegation is made as one of fact. There is no suggestion in the motion to dismiss that this fact is not well pleaded; or that a copy of the evidence introduced at the hearing should have been annexed to the bill." Baltimore and Ohio R.R. v U.S., 264 US 258, 262 (1924)

Property and Remedy:

Mr. DeNardo's remedies to redress the deprivation of his constitutional property interest as a permanent State employee (University of Alaska v Chauvin, 521 P2d 1234, 1238 (1974 Alaska) were an equitable unfair labor practice and an action at law (TR.15,L2-18). Vaca v Sipes, 386 US 171 (1967); Stites v Local 367, 430 P2d 153, 157 (1967, a providential dissenting opinion of Chief Justice Rabinowitz) Mr. DeNardo exercised his right to due process under art. 1 sec. 7 and trial by jury under art. 1 sec. 16 of the Alaska Constitution following the loss of jurisdiction engendered by the Agency's void decision. Aguchak v Montgomery Ward, 520 P2d 1352, 1358 (1974 Alaska) (T.R. 9,L12-20)

Collateral Attack:

A collateral attack (Holt v. Powell, 420 P2d 468, 471 (1966 Alaska)) was mounted at the summary judgment proceeding (TR.5,L13-26) (TR.11,L21) (TR.13,L24-25-TR.14, L1-2) (TR. 23,L25-TR.24,L1-2) (TR.25,L8-9 & 15-20) (R. 51-132) against the affirmative defenses of res judicata and failure to file a timely appeal (TR.4,L9-12). In response to the court's question, "Would you agree that if the decision was valid that a collateral attack such as this is proper (TR.25,L8-9)?" The State of Alaska answered, "I think that is the rule." (TR.25L10).

Conclusion.

"No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Breese v. Smith*, 501 P.2d 159, 168 (1972 Alaska).

The Supreme Court is called upon to apply the reasonable basis standard to undisputed facts (*NBA v. JBL & K*, 546 P.2d 579, 586 (1976 Alaska)) and exercise its power to avoid further delay in the ultimate resolution of this case. *Totem v. Alyeska*, 584 P.2d 15, 20 (1978 Alaska), Appellate Rule 520(c).

Mr. DeNardo prays the Supreme Court reverse the summary judgment for defendant and grant partial summary judgment on the liability to Mr. DeNardo with a remand for trial by jury to determine the damages; and rescind the order granting defendants' attorneys fees (R. 199) because Mr. DeNardo was defending his constitutional property

interest. *Crisp v. Kenai Peninsula School,* 587 P.2d 1168 (1978 Alaska) (R. 196).

Respectfully submitted this twenty-sixth day of January, 1981 at Anchorage, Alaska.

By /s/ DANIEL DE NARDO
Daniel DeNardo
Merchant and Trader At Law

Appendix D

The Supreme Court of the State of Alaska
File No. 5631

Daniel R. DeNardo,
Appellant,

v.

Patrick Murphy, Director,
Alaska Public Employees Association;
Alaska Public Employees Association; State of Alaska,
Appellees.

Memorandum Opinion and Judgment*
(No. 93—July 28, 1981)

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Karl S. Johnstone, Judge.

Appearances: Daniel R. DeNardo, Anchorage, *pro se*. Patrick E. Murphy, Faulkner, Banfield, Doogan & Holmes, Juneau, for Appellees Alaska Public Employees Association and Patrick Murphy. Richard Monkman and Amy J. Stephson, Assistant Attorneys General, Anchorage, and Wilson L. Condon, Attorney General, Juneau, for Appellee State of Alaska.

Before: Rabinowitz, Chief Justice, Connor, Burke, Matthews and Compton, Justices.

The judgment of the superior court is affirmed.

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*Entered pursuant to Appellate Rule 214.

Appendix E

Constitutional Provisions, Statutes and Rules

Constitutional Provisions

Constitution of the State of Alaska, Article I, Section 7

Due Process. No person shall be deprived of life, liberty, or property, without due process of law. The right of all persons to fair and just treatment in the course of legislative and executive investigations shall not be infringed.

Constitution of the State of Alaska, Article I, Section 16

Civil Suits: Trial by Jury. In civil cases where the amount in controversy exceeds two hundred fifty dollars, the right of trial by a jury of twelve is preserved to the same extent as it existed at common law. The legislature may make provision for a verdict by not less than three-fourths of the jury and, in courts not of record, may provide for a jury of not less than six or more than twelve.

FEDERAL STATUTES

28 U.S.C. § 1257

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United

States, and the decision is in favor of its validity. (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

28 U.S.C. § 2103

If an appeal to the Supreme Court is improvidently taken from the decision of the highest court of a State in a case where the proper mode of a review is by petition for certiorari, this alone shall not be ground for dismissal; but the papers whereon the appeal was taken shall be regarded and acted on as a petition for writ of certiorari and as if duly presented to the Supreme Court at the time the appeal was taken. Where in such a case there appears to be no reasonable ground for granting a petition for writ of certiorari it shall be competent for the Supreme Court to adjudge to the respondent reasonable damages for his delay, and single or double costs.

RULE OF COURT

Rule 45, Alaska Rules of Appellate Procedure

Appeals to Superior Court From District Court and From Administrative Agencies.

(a) When Taken.

(1) The time within which an appeal may be taken to the superior court from the district court shall be 30 days from the entry of the judgment appealed from. The running of the time for appeal shall be the same as set forth in Appellate Rule 7(a).

(2) The time within which an appeal may be taken to the superior court from an administrative agency shall be 30 days from the date that the order appealed from is mailed or delivered to the appellant. If a request for agency reconsideration is timely filed before the agency, the notice of appeal must be filed within 30 days after the agency's reconsideration decision.

Appellant's Reply Brief

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NO. 81-5566

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1981

DANIEL R. DeNARDO,
APPELLANT, IN PROPRIA PERSONA

vs.

PATRICK E. MURPHY, ALASKA PUBLIC EMPLOYEES
ASSOCIATION, AND THE STATE OF ALASKA
APPELLEES.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF ALASKA

REPLY BRIEF

Daniel R. DeNardo
In Propria Persona,
In Forma Pauperis
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Perry v Sinderman, 408 U.S. 593(1972) 2

St. Joseph Stock Yards v U.S., 298 U.S. 38(1936) 2

Voorhees v U.S. Bank, 10 Pet. 449(1836) 2

STATEMENT OF THE CASE

Appellees have made a statement in their Statement of the Case that is contrary to the record.

In their second paragraph they state that Mr. DeNardo "failed to meet his financial obligations to APEA." This is totally contrary to the facts as stated in the State of Alaska Labor Relations Agency's decision No. 39, appendix C of Mr. DeNardo's Jurisdictional Statement. Mr. DeNardo overpaid his fees by $112.00. Appendix C-2, lines 18-27 and C-3, lines 1-16.

SUMMARY OF ARGUMENT

Appellees entire argument is infected with two fundamental errors:

1. that they can attack a decision in their favor without cross-appealing
2. that a void decision is something more than mere waste paper

ARGUMENT

1. COLLATERAL ESTOPPEL FOR FAILURE TO CROSS-APPEAL PROHIBITS APPELLEES FROM DISPUTING A DECISION IN THEIR FAVOR

The void administrative decision was a fact on appeal. Baltimore and Ohio R.R. Co. v. ICC, 264 U.S. 258,262(1924)

The superior court found the State Labor Relations Agency's decision was void. As non-movant in the summary judgment proceeding, Mr. DeNardo had collaterally attacked the Agency's decision as void. All eighty-nine indisputable evidentiary documents were construed in a light most favorable to Mr. DeNardo as proving that the Agency was without jurisdiction to render a decision contrary to all the evidence and all the substantive law.

Since the decision was in appellees favor, they are collaterally estopped from denying the void decision. Appellees failed to timely file a cross-appeal from the superior court's decision and must not be heard to complain at this time. Maryland Insurance Co. v Woods, 6 Cranch 29; Martin v Northern Transportation Co., 12 Wall 31.

A party who has not appealed may not assign error. South Fork Canal Co. v Gordon, 6 Wall 561; New Orleans and B.S. Mail v Flanders, 12 Wall 130.

2. APPELLEES ARE ESTOPPED FROM ARGUING THAT THERE WAS NO FEDERAL QUESTION RAISED BELOW

A void decision is by nature jurisdictionally defective and operates as a deprivation of a Federal Constitutional property interest as defined by Perry v Sinderman, 408 U.S. 593(1972); Board of Regents v Roth, 408 U.S. 564 (1972). A void decision is a Constitutional fact in violation of the Fourteenth Amendment. St. Joseph Stock Yards Co. v United States, 298 U.S. 38,51(1936).

The void decision as lack of due process was argued before the superior court and the Alaska Supreme Court and this is admitted by appellees in their Statement of the Case. "Mr. DeNardo claimed the agency's decision was void...", and "Mr. DeNardo appealed that ruling to the Alaska Supreme Court, claiming he had been denied due process and trial by jury among other things." (Emphasis added.)

Throughout the litigation Mr. DeNardo has relied on United States Supreme Court cases for his argument that a void decision is loss of jurisdiction and a deprivation of Federal Constitutional rights. Bryant v Zimmerman, 278 U.S. 63,67-70(1928) is directly on point in identifying how a Federal question can be raised.

3. A VOID DECISION IS NEVER AN ADEQUATE NON-FEDERAL GROUND

The void decision of the Labor Relations Agency was a Constitutional fact and was not an issue on appeal. The void decision was mere waste paper. Voorhees v U.S. Bank, 10 Pet. 449(1836)

The affirmance by the Alaska Supreme Court of the superior court's dismissal for failure to file a timely appeal of a void decision, does nothing more than pass the Federal question onto the United States Supreme Court.

Appellees argument is completely disposed of by New York Central Railroad Co. v New York and Pennsylvania Co., 271 U.S. 124(1926), as given in Mr. DeNardo's Argument No. 1 on page 18 of the Jurisdictional Statement.

4. A DECISION BY AN AGENCY CREATED UNDER A STATE STATUTE IS WITHIN THE JURISDICTION OF 28 USC 1257(2)

Appellees undermine their own argument by misstating the principles in Lathrop v Donohue, 367 U.S. 820,824-825(1961). That case stands in opposition to appellees position by specifically citing Hamilton v Regents, 293 U.S. 245,257-258 and Lake Erie and Western R. Co. v State Public Utilities Commission, 249 U.S. 422. These cases declare that decisions of state agencies or commissions created pursuant to legislative enactment come within the class of cases falling within the jurisdiction of 28 USC 1257(2).

Appellees themselves cite Alaska Statute 23.40.070-Declaration of policy, for collective bargaining. (page 3 of their brief) That statute defines the State Labor Relations Agency's jurisdictional limits.

CONCLUSION

It is irrefutable that Mr. DeNardo properly raised the Federal Constitutional question of deprivation of property without due process, and that the Alaska courts refused to determine the Federal question. There was no order from the State Labor Relations Agency that Mr. DeNardo could bring before the United States Supreme Court, until the Alaska Supreme Court had ruled. It was at that point that Mr. DeNardo's rights had been infringed and an order was in the teeth of the statute AS 23.40.070.

The United States Supreme Court most certainly has jurisdiction under 28 USC 1257(2).

RESPECTFULLY SUBMITTED this 30th day of November, 1981.

Daniel R. DeNardo

Daniel R. DeNardo